Supreme Court, U.S.
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No.

In The
Supreme Court of the United States

October Term, 1996

SCOT A. REINERT,

Petitioner

v.

COMMONWEALTH OF PENNSYLVANIA

PETITION FOR WRIT OF CERTIORARI TO THE SUPERIOR COURT OF PENNSYLVANIA

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. May law enforcement officers that conducted an intrusive and pervasive five (5) hour search of the Petitioner's home, without a search warrant when no exigent circumstances existed, be permitted to search, seize and obtain evidence from the Petitioner's residence or does it violate the Fourth and Fourteenth Amendments and the holdings in Mincey v. Arizona, 437 U.S. 385, 57 L.Ed.2d 290, 98 S.Ct. 2408 (1978) and Thompson v. Louisiana, 469 U.S. 17, 83 L.Ed.2d 246, 105 S.Ct. 409 (1985)?

2. Were Petitioner's Fifth and Sixth Amendment rights violated when statements were admitted that were involuntary and/or where he was in custody and subject to interrogation without first being advised of his Miranda rights and/or was he physically and mentally capable of knowingly, intelligently and voluntarily waiving his constitutional rights while he was being treated for life-threatening injuries in an ambulance, hospital, and after emergency surgery?

3. Was Petitioner denied his Fifth and Sixth Amendment rights to effective assistance of trial counsel, due process, and a fair trial where trial counsel failed to: (A) call available expert medical and psychiatric witnesses to testify that Petitioner's physical and mental condition precluded a voluntary statement and/or a knowing, intelligent and voluntary waiver of his Miranda rights at the suppression hearing and at trial? (B) inform Petitioner, a person with no prior record, of his right to testify at the suppression hearing? (C) testify being a percipient witness of Petitioner's condition at the time of his statement, during the suppression hearing and at trial and/or withdrawn if necessary? (4) call an available expert to testify about the drug Prozac per the trial court's ruling?

4. Was Petitioner denied his Fifth and Sixth Amendment Rights when the trial court declared all lay testimony concerning the victim's use of Prozac inadmissible?

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PETITION FOR WRIT OF CERTIORARI TO THE SUPERIOR COURT PENNSYLVANIA

Scot A. Reinert, respectfully petitions this Court for a Writ of Certiorari to review the judgment of the Superior Court of Pennsylvania entered on January 23. 1996, affirming his conviction for murder.

OPINIONS BELOW

The Superior Court of Pennsylvania affirmed Petitioner's conviction and sentence in the Common Pleas Court of Lehigh County of Pennsylvania which was filed on January 23,1996, Appendix A. The Trial Court denied Petitioner's Pretrial Motions to Suppress in an Order and Opinion (App. B) and further denied his Post-trial Motion in an Order and Opinion (App. C.)

JURISDICTION

The Supreme Court of Pennsylvania denied, by Order, Reconsideration of Petitioner's Request for Allowance of Appeal to the Supreme Court, on December 11, 1996, having previously denied his Petition for Allowance of Appeal on September 26, 1996 and affirming Judgment and Opinion of the Pennsylvania Superior Court of January 23, 1996. Petitioner timely filed an Application for Extension of Time to File Petition for Writ of Certiorari, Application No. A-641, which was granted on March 7, 1997 and extending the time in which to file said Petition to and including May 10, 1997. Jurisdictionally, Petitioner invokes 28 U.S.C. §1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

The Fourth Amendment provides in part:

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

The Fourteenth Amendment provides in part

"...nor shall any state deprive any person of life, liberty or property without due process of law...".

The Sixth Amendment provides in part:

In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial, by an impartial jury....; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

The Fifth Amendment provides in pertinent part:

"No person . . . shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law."

PROCEDURAL HISTORY

Petitioner was arrested on March 10, 1991, charged with criminal homicide, as a result of the death of Sean Brady which occurred in the Petitioner's home. Pre-trial motions including Motions to Suppress physical evidence and statements were heard before the Court of Common Pleas, Lehigh County, Criminal Division, Carol K. McGinley, J., on August 20-21, 1991, and denied by on September 13, 1991.

A jury trial commenced on January 15, 1992. A verdict of guilty of murder in the first degree resulted and Petitioner was sentenced to life imprisonment. Timely post-trial motions were denied as to all issues on November 15, 1994.

Petitioner was represented at all stages to this point by Dianne Dickson, Esq. and Wallace Worth, Esq., of Worth Law Offices. Present undersigned counsel, entered his appearance to represent the Petitioner in the Superior Court.

Through new counsel, Petitioner appealed the Judgment of Sentence to the Superior Court submitting that serious errors and departures, preserved below, were committed by the court. Petitioner at the first opportunity raised the issue of the effectiveness of his trial counsel by submitting a number of affidavits/letters in support thereof and attached hereto. On January 23, 1996, the Superior Court denied relief on all grounds in a Memorandum Opinion. The Panel denied the ineffective claims without an evidentiary hearing. A Motion for Reconsideration to Panel and/or Reargument was denied by the Court on March 29, 1996.

A Petition for Allowance of Appeal and a Petition for Reconsideration of Denial of Petition for Allowance of Appeal were filed and denied by the Supreme Court, respectively,

on September 26, 1996 and December 11, 1996.

All claims raised were raised pursuant to both the Pennsylvania and United States Constitutions.

STATEMENT OF THE FACTS

On March 10, 1991, the Petitioner's mother, Mrs. Janet Ketner, phoned Scot Reinert at his home. During this call, Reinert told her that the KKK was present, there was a body in his house, S.N.T.[1] , 8/21/91, 28, and that the KKK had marked his home with a flag in the yard. Id. Alarmed and frightened by her son's remarks, she and her husband rushed to his home. They found Reinert sitting on the first floor covered in blood, with very large, visible gashes on both his wrists. Id. at 30; N.T[2] , Vol. V, 148. Mr. Ketner called 911 and described Petitioner as "delirious". Defense Trial Exhibit 26. Shortly, police and ambulance services arrived. Mrs. Ketner testified at both the suppression hearing and trial that her son appeared very strange, made a number of hallucinatory remarks regarding the presence of family members, the police, a naked Chinese man, and a disappearing corpse. S.N.T., 30-32; N.T., Vol V,. Mr. Ketner confirmed Reinert's poor mental/physical condition. He stated that "his eyes were very wide and darting back and forth. He looked very, very strange." S.N.T., 44. He first thought Reinert was under the influence of drugs. S.N.T., 44. It was also determined that Petitioner had attempted suicide by drinking alcohol, taking sleeping pills, and slashing his wrists.

Mertz, the first officer to arrive at the Reinert home at 12:11 p.m., checked on Reinert and his parents in the first floor living room, then headed up the stairs to check the report, by the parents, of a body on the third floor. N.T., Vol. I, 28, 37. Mertz testified that he checked the rooms on the second floor, including the bathroom, a middle room and Mr.

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[1] "S.N.T." refers to Suppression Hearing Notes of Testimony, August 20-21, 1991. The Superior Court permitted Petitioner to proceed upon the original record, as such, there is no reproduced record in the court below, and citations are to the trial transcript. The letters/affidavits filed and accepted by the Superior Court in support of ineffective claims are appended.

[2] "N.T." refers to Trial Notes of Testimony, January 17-30, 1992.

Reinert's bedroom and that he saw no one. Id. at 38. When he reached the third floor, Mertz checked Brady, determined he was dead; that medical assistance was not required, and then searched the third floor to insure that no one else was on the floor. Id.

Moments after Mertz's arrival at 12:11 p.m., three more Allentown police officers, Zimmerman, Lembach and Brader arrived at the home, followed shortly by the paramedics. Id. at 28. Zimmerman testified that he ran to the third floor to see if Mertz was all right, then, following Mertz's request to "secure the house", returned to the first floor living room where he remained with Reinert and his parents. Id. at 140-1. Lembach and Brader walked to the back door of Reinert's home, checking all the rooms on the first floor to insure no one was present. Lembach ordered Brader to remain on guard at the back door of the residence. Id. at 106. Lembach then returned to the first floor living room with Zimmerman, Reinert and his parents. Id. at 107. At this point, law enforcement officers had completed their protective sweep of the Reinert home; the police had checked for other potential victims or culprits, found none, and secured the premises.

The paramedics preliminarily treated the Petitioner, who was suffering from life threatening injuries, including multiple wounds to the abdomen, multiple lacerations of the wrist, and an injured ankle. Reinert's blood pressure was down, his pulse rate was up, and some of the answers he gave to the treating persons were incorrect and contradictory.[3] The paramedics then took the Petitioner to the ambulance by supporting him on either side by his arms. N.T., Vol. V, 152. They were immediately followed by Officers Zimmerman and Lembach. Zimmerman was ordered by his superiors to remain with Reinert, and stay in contact with him. S.N.T., 8/20/91, 65. Reinert was laid on a stretcher inside the ambulance, had an oxygen mask placed over his face, was given I.V.'s via his arms, and was hooked up to a electrocardiogram. Officer Lembach stood in the doorway of

[3] For instance, during the course of medical treatment, Reinert was asked about allergies. He told the paramedics he had none, N.T., Vol. I, 84, told the nurse he had one, S.N.T., 8/20/91, 89, and testified at trial that he actually has three, penicillin, codeine, and sulfur, N.T., Vol. VII, 163.

the ambulance and Officer Zimmerman sat near Reinert's head. The wounds in Reinert's abdomen, from which his intestines were protruding, were first noticed when he was in the ambulance, S.N.T., 8/20/91, 50. Upon the discovery of the abdomen wound, Paramedic Snyder asked Mr. Reinert "what happened?" S.N.T., 8/20/91, 14. Petitioner, while wearing the oxygen mask, stated "I stabbed him with a butcher knife, then I did myself." Id.; N.T., Vol. I, 62. Paramedic Snyder then turned to Officer Zimmerman and told him, "I think you ought to step in." S.N.T., 8/20/91, 14. Officer Zimmerman then, without advising Reinert of his Miranda rights, "directed a question saying what happened?" Id. at 50. Petitioner responded to this question by stating, "I think I killed him. I think I stabbed him." Id. Then, while paramedics were working on Reinert and while still wearing the oxygen mask, Zimmerman read Reinert his Miranda rights. Id. Per Zimmerman, Reinert responded to the question, "do you understand these rights" by saying: "As best he could, yeah, he -- they were working on him and he, you know, he kind of nodded and the he said yes or yeah." Id. at 52. Zimmerman then asked another question, to which Reinert said "I stabbed him. I think I killed him." Id. at 143. Finally he asked Reinert who he had killed, and he responded, "Sean, Sean Brady," "with a butcher knife." Id. at 52-3.

Officer Lembach left the ambulance, returned to the Reinert home and spoke to Sgt. Trimmer, a supervisor at the scene. N.T., Vol. I, 112. Trimmer relieved Officer Brader of his duty to guard the back door, N.T., Vol. I, 121, and sent him in the ambulance with Mr. Reinert, Officer Zimmerman, and the paramedics. Id. at 111-12. Lembach then maintained a constant guard over the Ketners and Cindy Mellinger, a friend of Mr. Reinert, in the first floor living room. Id. at 112. The ambulance left the Reinert's home at 12:28 p.m., for the hospital. Reinert's emergency treatment continued.

The home secured, the officers awaited the arrival of lead detectives, Stauffer and Granitz, who arrived at Reinert's home at approximately 12:45 p.m. , and Sergeant Moyer, a police photographer, who arrived at approximately 1:00 p.m. Detective Stauffer spoke with Officer Mertz and Sergeants Trimmer and Higgins, all of whom appraised Stauffer of all they knew about the situation up to that point. S.N.T.,

8/20/91, 126. Police then searched both the victim's and Reinert's cars without a warrant. N.T., Vol. I, 134.

Approximately 1 hour after the house was secured, Detective Stauffer, Detective Granitz, who described himself as the "evidence" or "bag" man, S.N.T., 184 and Moyer began an intrusive, thorough warrantless search of the Reinert home, which included the painstaking, slow, deliberate and methodical room by room photographing and videotaping of the entire home, and lasted more than five (5) hours. The detectives and Sgt. Moyer rummaged through garbage cans, S.N.T., 8/21/91, 25, overturned mattresses, opened drawers, S.N.T., 8/21/91, 24, and looked through medicine cabinets, eventually finding and seizing 64 items, including torn-up notes, a knife, bloody clothing, and magazines hidden under mattresses. See, Com. Trial Exhibits 33, 64, 66.

In the hospital, at 12:45 p.m., Reinert underwent immediate preparatory treatment for surgery in the "Code Red" room by Nurses Gavigan and Lombardo. Police officers were ordered by their superiors to stand guard outside his room. Officer Zimmerman asked Gavigan, prior to his treatment of Reinert, to note down anything that Reinert said which may be of use to the police. S.N.T., 78. During this preparation, Nurse Gavigan asked Reinert some questions, to which Reinert responded that he had been fighting with his friend with a knife, they had fallen off the bed and that he, the friend, might have done this. Reinert also acknowledged he might have wounded himself, and that he had fallen down the stairs. S.N.T., 8/20/91, 79. Officer Zimmerman testified Nurse Gavigan reported to him three times during Reinert's treatment. Id. at 90, S.N.T., 8/20/91, 70.

Reinert entered surgery at approximately 1:15 p.m. Just prior, Reinert had been given Pentathol, a barbiturate, Norcuron, a muscle relaxant, Anectin, another muscle relaxant, Fentanyl, a synthesized narcotic (not mentioned in trial court opinion), and Forane as anesthesia. N.T., Vol. III, 15. Surgery lasted approximately two and one-half hours. It was discovered that one of the knife wounds in Reinert's abdomen had also cut his liver. Reinert had lost 200 cc's of blood during the operation, Id. at 16, and a quart of blood prior to being treated by the paramedics. N.T., Vol. IV, 75. Reinert experienced post-operative pain, Id. at 61. He was given

Robinal, a sedative and muscle relaxant, at 3:30 pm., S.N.T., 8/21/91, 8, and Cefoxitan at 6:00 p.m. Sometime after 3:30 p.m., Reinert was taken to the Shock Trauma Unit. On the orders of superiors, officers remained guarding Petitioner's surgery room, S.N.T., 8/20.91, 55, and inside his recovery room. S.N.T., 8/20/91, 135. Several of Reinert's wounds, including those on his thumb and in his abdomen, were determined to be defensive wounds. Others were self-inflicted.

The Ketners and Cindy Mellinger were detained at Reinert's home by the police and were not given permission to leave until 4:00 p.m. They were kept separated from Reinert and prevented from learning his condition, providing support or obtaining counsel. Detectives Stauffer and Granitz left Reinert's home at approximately 6:18 p.m. S.N.T., 8/20/91, 131. Thus, this second warrantless search of the Reinert home lasted more than 5 hours. Parents arrived at the hospital about 5 p.m., but were not allowed to see Reinert and further isolated from him on the orders of the police until the detectives, who had not yet arrived, questioned Reinert. S.N.T., 8/21/91, 33.

At 7:47 p.m., Detectives Stauffer and Granitz arrived at the hospital. S.N.T., 8/20/91, 132. They came from the police station, without either a tape recorder or video recorder. They interviewed Reinert while he was laying in his recovery room, wrists and abdomen bandaged, attached to I.V.'s and other emergency equipment. Id. at 197. The guarding, uniformed police officer inside Reinert's room was told to leave the room by the detectives. Id. They closed the screen surrounding Reinert's bed, stood on either side of him near his head, and began questioning him after reading him his Miranda rights. Id. The two detectives present differing accounts. Stauffer stating that Reinert answered the question (Do you waive these [Miranda] rights?) by saying "yes", while Granitz states that Reinert merely nodded his head. Questioning continued for forty-five minutes, during which Reinert gave his most incriminating statement when he allegedly said that he obtained a knife, went to see Mr. Brady, who was in bed, and stabbed him (a critical Commonwealth piece of evidence to seek to establish premeditation). Detectives Stauffer and Granitz finished questioning him at

approximately 8:37 p.m. and Detective Stauffer ordered that Reinert remain under police guard. S.N.T., 8/20/91, 142.

Only after Stauffer and Granitz left were the parents, Cindy Mellinger, Reinert's priest and attorneys allowed to visit him. S.N.T., 8/21/91, 34. Lay testimony was presented that Reinert was weak, in pain, soft-spoken, "thick-tongued" and hard to understand. S.N.T., 8/21/91, 46. Reinert received morphine for the pain at 10:00 p.m. on Sunday, and three times in the early morning and afternoon of March 11, 1991.

At trial, Reinert's defense was that he believed Brady was attempting to commit suicide when he entered his room. Reinert stated that Brady reached for the knife, which was already in the room, on his own, and when Reinert attempted to intervene a struggle occurred over the knife.

Prior Trial counsel, among other things, failed to obtain medical experts for the defense that would and could have testified that Reinert was incapable of making a voluntary statement, physically and mentally incapable of executing a knowing, intelligent and voluntary waiver of his Miranda rights given his condition. See, Affidavits filed in the Superior Court including affidavits/letters of two psychiatrists, Dr. Robert L. Sadoff, App.G, and Dr. Lynn Bornfriend, App.F, Scot Reinert, App.H, both parents, App. I, App. J, and prior trial counsel, Dianne M. Dickson, App.K, all in support of reversal or minimally an evidentiary hearing. Also see supp. letters of Dr. Sadoff, App."GG", and Dr. Bornfriend, App.FF.

REASONS FOR GRANTING PETITION

1. Police that conducted an intrusive and pervasive five (5) hour search of Petitioner's home, without a search warrant, when no exigent circumstances existed, were not permitted to search, seize and obtain evidence from Petitioner's residence in violation of the Fourth and Fourteenth Amendments and Mincey v. Arizona, 437 U.S. 385, 57 L.Ed.2d 290, 98 S.Ct. 2408 (1978) and Thompson v. Louisiana, 469 U.S. 17, 83 L.Ed.2d 246, 105 S.Ct. 409 (1985).

The warrantless search and seizure that occurred violates long-standing state and federal jurisprudential

principles. In the absence of exigent circumstances, a search warrant must be obtained, particularly where the area to be searched is the home: the most protected area. The facts and legal issues are controlled by United States Supreme Court decisions, Mincey v. Arizona 437 U.S. 385, 98 S.Ct. 2408 (1978) and Thompson v. Louisiana , 469 U.S. 17, 105 S.Ct. 409 (1984).

Here, the opportunity exists for this Court to apply Federal jurisprudential search and seizures principles based on the similar factual and legal settings of Thompson and Mincey, and provide clear continuing authority to Pennsylvania authorities and other States that the historic warrant requirement cannot be flouted. Herein, Petitioner has also not received adequate appellate review as the Pennsylvania Superior Court failed to review the issue other than to cite to the erroneous determination of the trial court. And see, Commonwealth v. Lewin, 407 Mass. 617, 555 N.E.2d 551(1990) (state Supreme Court, suppresses evidence, secured under similar facts including photographs and videotape made in secondary warrantless search.)

The Fourth Amendment prohibits governmental intrusions into a private dwelling without a warrant supported by probable cause, subject only to a few carefully delineated exceptions. Thompson v. Louisiana , 469 U.S. 17,859 F.2d 1501, 19-20, 83 L. Ed. 2d 246, 105 S. Ct. 409 (1984). See also Payton v. New York, 445 U.S. 573, 590, 63 L. Ed. 2d 639, 100 S. Ct. 1371 (1980) ("In terms that apply equally to seizures of property and to seizures of persons, the Fourth Amendment has drawn a firm line at the entrance to the house. Absent exigent circumstances, that threshold may not reasonably be crossed without a warrant."); Coolidge v. New Hampshire , 403 U.S. 443, 474-75,29 L. Ed. 2d 564, 91 S. Ct. 2022 (1971). In fact, the "physical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed." United States v. United States District Court, 407 U.S. 297, 313, 32 L. Ed. 2d 752, 92 S. Ct. 2125 (1972). In view of this strong command, the Supreme Court has declared that searches and seizures inside a residence without a warrant are "presumptively unreasonable," Payton v. New York, 445 U.S. at 586, and the police bear a "heavy burden when attempting to demonstrate an urgent

need" that might justify a warrantless entry. Welsh v. Wisconsin, 466 U.S. 740, 750, 80 L. Ed. 2d 732, 104 S. Ct. 2091 (1984). See also United States v. Morgan, 743 F.2d 1158, 1162 (6th Cir. 1984) ("the burden is on the government to demonstrate exigency") (cases cited therein), cert. denied, 471 U.S. 1061, 105 S. Ct. 2126, 85 L. Ed. 2d 490 (1985).

Here, as in Mincey and Thompson, officers arrived at a homicide scene and conducted a protective warrantless search of the home to ensure that there were no other victims, culprits or threat that evidence would be destroyed or removed. Once this initial protective sweep was conducted, the residence was secured and any exigent circumstances which justified the initial protective search ceased to exist. A search warrant was required. Petitioner had been removed from the premises, higher ranking lead detectives arrived and were informed that the murder scene had been secured. Without first obtaining a search warrant, the later arriving lead detectives with the aid of a police photographer and videographer, commenced a painstaking, slow, deliberate, methodical five (5) hour secondary warrantless search moving room to room throughout the entire house, while at the same time photographing and videotaping. It is this secondary warrantless search (as in Mincey and Thompson), (as well as the first search) which occurred after the exigent circumstances had dissipated, that is violative of the Fourth Amendment Thus, all evidence observed, searched, seized or obtained during the course of the second warrantless search must be suppressed along with any fruits thereof.

The uncontroverted facts of record reveals that the Reinert home was secured, within minutes after an initial protective sweep of the premises by police. Any argument that lead Detectives Stauffer and Granitz, were attempting to "secure the premises" is unavailing, as (1) that already occurred approximately one hour earlier, and (2) under any definition - a five (5) hour slow and methodical room by room investigation, photographing and videotaping belies any notion of a prompt or protective sweep of the premises. Unless the police expected to find injured or threatening individuals in medicine cabinets, garbage cans, inside closed drawers, or under mattresses or dressers, the conduct of the police officers during the second warrantless search was

conducted purely for the purposes of gathering evidence and investigating the crime.

Further, the trial's court reliance on the plain view exception and Arizona v. Hicks, 480 U.S. 321, 107 S.Ct. 1149, 94 L.Ed.2d 347 (1987) is misplaced as it cannot justify the officers' seizure of evidence in the instant case. The initial securing officers saw little, did not comply with the prongs of Hicks, and seized nothing. It was the impermissible secondary movement through the house that put them in the position to make a view to which they were not otherwise entitled without a warrant. Moreover, many of the items seized, including, the MEN magazine found under the Petitioner's bedroom mattress, a notebook found in bathroom, a bottle of People's pain reliever from medicine chest in bathroom, and a ripped up note and letter, respectively, found in the garbage cans of the 2nd floor bathroom and the kitchen, were not, and could not be, objects for which the police had, upon their discovery, probable cause to believe were linked to criminal activity. The seizure of these items is indicative of an intention to search and collect evidence without a warrant. Particularly in light of well-established caselaw which forbid police officers from moving objects, during the conduct of the search, to discover their incriminating character, if any. Arizona v. Hicks, supra. Here, the police not only moved Petitioner's property to reach certain evidence, but they also had to piece together certain evidence, i.e. the ripped-up note, before its incriminating character, if any, was revealed. Such evidence including all videotaping and photographing should be suppressed, as this occurred without a warrant. The crime scene was thoroughly under police control, and status quo was easily maintained, there was nothing preventing the police from seeking a warrant.

The Superior Court rejected Petitioner's ineffective claim that Officer Mertz should have been called as a witness in the suppression hearing, where he would have testified that he already performed a protective walkthrough, making Officer Stauffer's later search unlawful because he would have been merely cumulative to that of "Zimmerman and Lembach" (who) "testified that they had secured the crime scene and conducted a protective walk through before Officer Stauffer". Superior Court Opinion App. "A", 5. It is that

recognition that Zimmerman, Lembach and Mertz performed the protective walkthrough initially and prior to the later warrantless arrival of Stauffer that makes the second search unlawful. Within the same paragraph, the Panel states that the suppression court concluded that the search conducted by Officer Stauffer was lawful because he was "securing the crime scene and performing a protective walk through." Id. at 5. However, the Superior Court concluded to the contrary, that, Zimmerman and Lembach had already secured the premises.

Mincey v. Arizona 98 S.Ct. at 2408 (1978) and Thompson v. Louisiana , 105 S.Ct. at 409, have uniformly held that no "murder scene exception" to the warrant requirement exists and, thus, police must obtain a warrant to continue investigating a crime scene. In Mincey :

> Except for the fact that the offense under investigation was a homicide, there were no exigent circumstances in this case...There was no indication that evidence would be lost, destroyed, or removed during the time required to obtain a search warrant. Indeed, the police guard at the apartment minimized that possibility. And there is no suggestion that a search warrant could not easily and conveniently have been obtained. We decline to hold that the seriousness of the offense under investigation itself creates exigent circumstances of the kind that under the Fourth Amendment justify a warrantless search. 98 S.Ct. at 2414.

The Supreme Court in Thompson , on facts as close to the facts in the instant case as is possible , affirmed its holding in Mincey , and refused to create a "murder scene" exception to the warrant requirement. In Thompson , the Appellant shot her spouse, attempted to commit suicide by ingesting pills, reconsidered her suicide attempt and called her daughter. Similarly, the daughter called the police to Appellant's home, let the officers into the home, and the police performed a "cursory search" of the home and discovered the corpse of the victim in the bedroom and the Appellant in another room. As here, the police transported Appellant to hospital and secured the scene. Thirty-five minutes later , less time than here, members of the homicide unit arrived and

performed a follow-up investigation of the homicide and attempted suicide. In the Thompson search, which lasted two hours, the detectives examined each room of the house, and seized several items, including a pistol found inside a chest of drawers, a ripped up note in a wastepaper basket, and another letter, presumably a suicide note, inside a Christmas card on top of the chest of drawers. Id. at 410. As here, by the time of the homicide detectives arrival, the officers who first responded at the scene had already searched the home for suspects or other victims. Id at 410.

The Supreme Court rejected Louisiana's argument, similar to the trial court's here, that Mincey was distinguishable due to the length of the search, four days, as compared to Louisiana's two hour search of Thompson's home. The Reinert trial court did not address Thompson.

> Although we agree that the scope of the intrusion was certainly greater in Mincey than here, nothing in Mincey turned on the length of time taken in the search or the date on which it was conducted. A two-hour general search remains a significant intrusion on petitioner's privacy and therefore may only be conducted subject to the constraints - including the warrant requirement - of the Fourth Amendment. Thompson v. Louisiana, 105 S.Ct. at 411. (emphasis added).

Thus, the Thompson Court held that where, as here, the first search [for suspects or persons dangerous to the police or evidence] is completed prior to the commencement of the second search a warrant is required. Id. at 412. The Superior Court did not address Thompson, either. Given this Court's absolute refusal to weaken privacy rights by creation of a "murder scene exception", and its unwillingness to admit evidence seized without a warrant when a murder scene is already secured and/or no exigency exists, Petitioner maintains that the Commonwealth may not conduct a five hour, warrantless search of a home simply because they care to investigate a crime scene and do not want to take the time to apply for a search warrant. As such, all the items obtained, and fruits thereof physical or otherwise, during the illegal search of the Petitioner's home should have been

declared inadmissible as a violation of the Fourth /Fourteenth Amendment of the United States Constitution, including all items such as all physical evidence, observations, photographs and videotape. Wong-Sun v. United States, 371 U.S. 471, 83 S.Ct. 407, 9 L.Ed.2d 441 (1963).

2. Fifth and Sixth Amendments were violated when statements were admitted that were involuntary and/or where Petitioner was in custody and subject to interrogation without first being advised of his Miranda rights and/or was he physically and mentally capable of knowingly, intelligently and voluntarily waiving his constitutional rights while he was being treated for life-threatening injuries in an ambulance, hospital, and after emergency surgery.

The Superior Court erred when it failed to review, other than cite to the erroneous trial court opinion, that statements made by Reinert in the ambulance and at the hospital, both before and after his operation, were admissible. The trial court erred when it failed to suppress incriminating statements of varying degrees made by Reinert, which were involuntary, made while he was in custody, subject to interrogation and was suffering from life threatening physical wounds, including knife wounds to his abdomen which pierced his liver and from which his intestines were protruding. Mr. Reinert had also recently attempted to kill himself three times by slashing his wrists and ingesting sleeping pills with alcohol. He was forced to remain incommunicado for over nine hours and was kept isolated from his friends and family who had expressed a desire to see and speak to him. Statements were also obtained by law enforcement agents during the course of custodial interrogation prior to Reinert being read his Miranda rights. A number of statements are at issue, each illegal in their own right, and each tainting subsequent ones.

> ...any criminal trial use against a defendant of his involuntary statement is a denial of due process of law "even though there is ample evidence aside from the confession to support the conviction." (cases

omitted). If, therefore, Mincey's statements to Detective Hust were not "'the product of a rational intellect and a free will.'" Townsend v. Sain, 372 U.S. 293, 307, quoting Blackburn v. Alabama, 361 U.S. 199, 208, his conviction cannot stand. In making this critical determination, we are not bound by the Arizona Supreme Court's holding that the statements were voluntary. Instead, this Court is under a duty to make an independent evaluation of the record. Davis v. North Carolina, 384 U.S. 737, 741-742; Haynes v. Washington, supra, at 515-516. Mincey v. Arizona 437 U.S. 385, 398; 98 S.Ct. 2408, 2416. (emphasis supplied),

THE STATEMENTS WERE INVOLUNTARY

Mincey v. Arizona, supra, provides controlling authority demonstrating the utter involuntariness of the statements:

> It is hard to imagine a situation less conducive to the exercise of "a rational intellect and a free will" than Mincey's. He had been seriously wounded just a few hours earlier, and had arrived at the hospital "depressed almost to the point of coma," according to his attending physician. Although he had received some treatment, his condition at the time of Hust's interrogation was still sufficiently serious that he was in the intensive care unit. n14 He complained to Hust that the pain in his leg was "unbearable." He was evidently confused and unable to think clearly about either the events of that afternoon or the circumstances of his interrogation, since some of his written answers were on their face not entirely coherent. n15 Finally, while Mincey was being questioned he was lying on his back on a hospital bed, encumbered by tubes, needles, and breathing apparatus. He was, in short, "at the complete mercy" of Detective Hust, unable to escape or resist the thrust of Hust's interrogation. Cf. Beecher v. Alabama, 389 U.S. 35, 38. Mincey v. Arizona 437 U.S. 385, 398; 98 S. Ct. 2408, 2416, 57 L. Ed. 2d 290 (1978).

CUSTODY IN THE AMBULANCE AND IN THE HOSPITAL

> "By custodial interrogation, we mean questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way." Miranda

v. Arizona, 384 U.S. 436 ,444, 86 S. Ct. 1602, 1612. (1966).

Unlike other cases interpreting "custody" - due to Reinert's injuries he was physically and mentally unable to simply walk away from the questioning. This factor must be considered in a determination of custody and is a significant reason why this Court should accept this case for review. Petitioner was in custody from the moment he was taken from his home on March 10, 1991, as the record reflects:

1. Paramedics, assisted the injured Petitioner, to the ambulance by grabbing his arms and bringing him to the ambulance.
2. The paramedics willingly provided the police with access to the ambulance, and police enabled themselves to be in position to overhear questions placed to Mr. Reinert by the paramedics.
3. Officer Zimmerman was ordered to stay with the Petitioner, and he and Lembach did so.
4. The Petitioner was lying down on a stretcher, in an enclosed, cramped space, surrounded by two paramedics and two police officers.
5. Petitioner was being treated for several open wounds on his wrists and a life-threatening wound to his abdomen, from which his intestines were protruding. Further, Petitioner had low pressure, a high pulse, and was in shock.
6. Officer Zimmerman and Brader were also ordered by Sergeant Trimmer to "maintain, you know, with contact with him as far as that was possible." (emphasis added). Reinert's parents were prevented by the police from accompanying the petitioner to the hospital.
7. At the hospital, Reinert was continually kept under guard, even while he was in the "Code Red" room of the hospital being prepared for surgery.
8. Officer Zimmerman, who remained outside the "Code Red" room, ordered Nurse Gavigan to "note down anything that the patient said, that may be of use to him." During the treatment of the Petitioner, Nurse Gavigan reported to Officer Zimmerman two or three times.
9. The Ketner's were not given permission to leave Reinert's

home and go to the hospital to find out the condition of their son until around 4:00 p.m. The Ketner's arrived at the hospital at about 5 p.m., but were not allowed to see Reinert per orders of the police until the detectives, who had not yet arrived, questioned Reinert. Reinert and his parents were again kept isolated from each other.

10. Both before and after surgery, Reinert remained under police guard. Reinert was questioned by Detectives Stauffer and Granitz later that evening.

11. Detectives stood on either side of the Petitioner's hospital bed with the curtains around the bed drawn and questioned the Petitioner for approximately 45-50 minutes, during which Reinert allegedly gave an incriminating statement. After which, Petitioner remained under police guard.

An individual's constitutional rights under the Fifth Amendment of the Constitution require that a defendant be instructed of his Miranda rights so long as that individual is in custody and is subject to interrogation. Custodial interrogation does not require that the police make a formal arrest or intend to make an arrest.

Petitioner was isolated by police authorities from family members, including in the ambulance and at hospital.

Petitioner was physically incapable of movement under his own power, as he desperately needed medical treatment and, as such, necessarily had to stay in the ambulance and go where he was brought. Even if the Petitioner was capable of movement, the police would not have allowed him to go anywhere unaccompanied. Anyone under these circumstances would reasonably believe that their freedom was significantly restricted and in police custody.

STATEMENT MADE WHILE IN THE AMBULANCE

Petitioner allegedly made statements while being treated in the ambulance, in custody, and before he was read his Miranda rights by Officer Zimmerman.

Petitioner's response to police questioning was the product of direct custodial examination by a police officer prior to the Petitioner being advised of his Miranda rights. Officer Zimmerman's question, "what happened", following as it did

Paramedic Snyder's directive, "I think you ought to step in", is a question which Officer Zimmerman should have known was reasonably likely to elicit an incriminating response from the Petitioner. Rhode Island v. Innis, 446 U.S. 291, 301, 100 S.Ct. 1682, 1689, 64 L.Ed.2d 297 (1980). Prior thereto, Officer Zimmerman should have advised the Petitioner of his Miranda rights. Interrogation encompasses not only actual questions directed at an individual by the police, but also any words, actions, or practice by the police which they should know are reasonably likely to elicit a confession or other incriminating responses from the individual in custody.

THE PARAMEDICS WERE AGENTS OF THE POLICE

The statement allegedly made by Petitioner to paramedic Snyder should also be suppressed, as paramedic Snyder was acting as an agent or instrumentality of the police when, upon hearing the statement made by Petitioner, he "turned to the officer that was directly behind me, which was Officer Zimmerman, and said I think you ought to step in," Id. Paramedic Snyder testified that he really "directed the officer that he may want to start talking to the witness..." N.T., Vol. I, 62 (emphasis added). Thus, the statement is suppressible for two independent reasons. First, the relationship between the paramedics and the the police was such that the paramedics were working as extensions of the police and assisting them in any way possible. The police were allowed, to the exclusion of Petitioner's parents, who would have been helpful in providing information critical to Reinert's treatment, such as allergies, to sit in on Reinert's treatment. The police were allowed, and apparently had license to, ride with the Petitioner and the paramedics to the ambulance. Officer Zimmerman's statement that "...we did ask him. I directed a question," S.N.T., 8/20/91, 50, supports Petitioner that the paramedics and police, in this instance, worked so closely with one another the paramedics were the constructive agents of the police. The fact that the paramedic would even call Officer Zimmerman's attention to the statement, or direct the Officer to question Petitioner, supports this agency contention. A private citizen who volunteers or is requested to question the subject becomes an agent of the government and becomes bound by Miranda.

Second, the fact that Zimmerman and Lembach were ordered to follow the Petitioner to the ambulance and sit in on the examination and questioning by the paramedics was, in effect, impermissible conduct or actions which the officers reasonably should have known would elicit incriminating statements.

More egregiously, the officers presence placed the Petitioner in an untenable position, he could respond to the questions asked of him by the paramedics and receive medical attention and, as a consequence, state incriminating evidence; or he could refuse to answer questions, thereby running the risk of failing to obtain much needed medical attention. This is a type of behavior that Constitutional law and public policy should condemn. Law enforcement should not benefit from such a situation. In fact, this conduct raises due process concerns under the U.S. Constitution. In any event, an individual facing such a dilemma should at least be apprised of his Miranda rights so he can make an informed decision about self-incrimination.

HOSPITAL STATEMENT BEFORE SURGERY

Petitioner makes another statement in the hospital's "Code Red" room while being prepared for the emergency surgery needed to stitch up his slashed wrists, repair his damaged liver, and place his intestines back in his abdomen. Petitioner's room was guarded by uniformed police officers, S.N.T., 8/20/91, 55, and he thus contends that his freedom of action was restricted so that he was in custody. Thus, not only had the police utilized the ambulance for their purpose, but had achieved a presence at the hospital and were in a position to make demands upon emergency room staff to gather information for them. Mr. Gavigan and his partner, Nurse Lombardo, then took time from their treatment of Petitioner, who suffered severe, potentially life threatening wounds, N.T., Vol. IV, 74, to write down the things said by Petitioner in answer to their questions. S.N.T., 8/20/91, 79. Nurse Gavigan, although he already had the EMS report detailing Petitioner's wounds, including Reinert's statements about how the wounds were caused, again questioned Petitioner. Even more egregiously, Nurse Gavigan came out

of the emergency room two, S.N.T., 8/20/91, 90, or three, Id. at 70, times to inform the police what happened while he was treating the Petitioner. Nurses Gavigan and Lombardo acted as agents, or instrumentalities, of the police, and took advantage of the patient-medical provider relationship, and Petitioner should have received his Miranda rights prior to such questioning, which also raises due process concerns.

INCAPABLE OF WAIVER

Two statements independently raise the question whether Petitioner was physically and mentally capable of knowingly, intelligently and voluntarily waiving his constitutional rights. The first of these two statements was made to Officer Zimmerman in the ambulance. The second a post-operative statement, was the most damaging statement made by Reinert in which he states that at some point he got a butcher knife. This statement was made to Officer Stauffer shortly after Petitioner had undergone 2-1/2 hours of surgery. The trial court concluded that both these statements were confessions made after a voluntary waiver of Petitioner's constitutional rights. Opinion, App. "A", 29a-32a. However, Petitioner's medical condition at the time of both statements was such that a knowing, intelligent and voluntary waiver of his rights was impossible. See Affidavit of Scot Reinert, App. H, Affidavit of the parents, App. I, App. J, Affidavit of prior trial counsel, App. K, detailed 5 page Affidavit of Dr. Sadoff, App. G, ("Thus, it is for all these reasons that it is my opinion, within reasonable medical certainty, that at the time of the taking of the statement by the police...his [Petitioner's] mental state was not clear enough for him to be competent to waive his Miranda Warnings or to give a truly voluntary statement".) App. G, ; detailed 4 page Affidavit of Dr. Bornfriend, App. F, ("Any statements made in the ambulance cannot be considered voluntary, because of his medical and psychiatric condition, and the severity of the medical and psychological stressors in this case leads me to believe with a reasonable degree of medical certainty that Mr. Reinert was incapable of knowingly and intelligently waiving his Miranda Rights."). App. F. Also see supplemental letters of Dr. Sadoff, App."GG", and Dr. Bornfriend, App.FF, emphasizing their position and availability to have testified.

The Commonwealth must show, by a preponderance of the evidence, that the waiver of Miranda rights was knowing and intelligent, and that the accused was aware of both the rights and of the risks of forfeiting such rights. While the test of whether the confession was voluntary and the waiver of the Miranda rights was valid is one of the totality of the circumstances, Courts must consider: the duration and method of interrogation, condition of detention, manifest attitude of the police toward the accused, accused's physical and psychological state, and other conditions which may serve to drain one's powers of resistance to suggestion and undermine his self-determination.

In determining voluntariness, it is important to note that sickness, mental trauma, and ill health may well influence an accused's will to resist.

An individual, while being questioned, is capable of answering "yes" and "no" to Miranda warnings and answering questions put to him by police interrogators is not necessarily evidence of an intelligent and knowing waiver of his Miranda rights.

For example, in Commonwealth v. Perry, 475 Pa. 1, 379 A.2d 545 (1977), the court recognized that the line between a voluntary and involuntary confession is composed of subtle gradations. The question is whether the confession is the product of an essentially free and unconstrained choice by its maker. Perry, was in pain, hospitalized, under police guard and had not seen a friendly face for more than twelve hours at the time of his interrogation. The court, ruled the statements were not voluntarily or intelligently made. Id. at 8.

The Pennsylvania legislature has recognized, through 42 Pa.C.S.A. 7101, that decisions made by injured parties in a hospital are suspect, and raise serious questions whether such decisions should be recognized as valid.

INCAPABLE OF WAIVER IN THE AMBULANCE.

After subjecting Reinert to custodial interrogation without the benefit of Miranda warnings, and receiving an allegedly incriminating statement, Officer Zimmerman read Reinert his Miranda warnings, and described Reinert's

response to the question, "do you understand these rights" in the following way: "As best he could, yeah, he -- they were working on him and he, you know, he kind of nodded and then he said yes or yeah." Id. at 52 (emphasis added). Zimmerman then further questioned Reinert who allegedly said "I stabbed him. I think I killed him." Id. at 143. Lembach remembers Reinert's alleged waiver differently, in that Reinert supposedly answered "yeah" to both Miranda questions (Do you understand your rights? Do you waive them?). N.T., Vol. 1, 110. The fact that Reinert was capable of nodding his head and/or saying 'yes' or 'yeah' to questions put to him by Officer Zimmerman is not indicative of an intelligent and knowing waiver of his rights, especially given that the two officers present conflicting testimony as to the nature of his alleged waiver, his response to the question, according to one of the officers, included a kind of nod of his head, which at that point was covered by an oxygen mask, and Reinert was suffering from grievous, life-threatening injuries. N.T., Vol. IV, 74. Officer Zimmerman then asked Reinert who he had killed, and he responded, "Sean, Sean Brady," , "with a butcher knife." Id. at 52-3. The first mention of a butcher knife.

It is important to consider Reinert's alleged waiver in the context of his mental and physical condition. Reinert was being treated for his life threatening abdominal wounds, N.T., Vol.IV, 74, from which his intestine was protruding, N.T., Vol I., 81, 162, and which had caused his liver to be sliced, a wound to his ankle or foot, and multiple wrist wounds. The deep multiple wrist wounds were caused during Reinert's first two suicide attempts with a knife and razor blades. He lost a quart of blood. Id. at 75. Reinert ingested two boxes of sleeping pills with wine in a third attempt to kill himself. N.T., Vol. VII, 126. His parents testified that Reinert was hallucinating when they arrived. S.N.T., 44; S.N.T., 30. Paramedics had just escorted him from the house by his arms, and he was prone on the stretcher in the ambulance, receiving lactator ringers through intravenous injections, S.N.T., 8/20/91, 19. Reinert was wearing an oxygen mask, N.T., Vol. I, 145 and was connected to an electrocardiogram, Id at 47-48. Reinert complained to the paramedic of pain. A police officer was blocking one exit from the ambulance, the interrogating officer was hovering above Reinert's head, and

the two paramedics were close to him as well, still treating his injuries. Despite the importance of giving the correct information about allergies to treating personnel, Id. at 84, Reinert incorrectly told Snyder he didn't have any allergies. Id. at 84. Later, Reinert incorrectly told Gavigan, who was preparing him for surgery, that he was allergic to penicillin. S.N.T., 8/20/91, 89. Reinert's mental acuity was seriously diminished.

Further indicative of Reinert's weakened mental and physical condition was Reinert's failure, despite suffering from a life threatening stab wound to the stomach, N.T., Vol IV, 74 to inform the treating paramedics of this injury; it was treated only after the paramedics discovered it themselves. S.N.T., 8/20/91, 14. See Affidavit, Dr. Bornfriend ("Despite his first being attended to in the house, his walking to the ambulance and the initiation of treatment in the ambulance, at not time did Mr. Reinert make the EMT's aware of several abdominal wounds, including a wound extruding the small bowel and mesentary. His wounds were discovered incidentally as the paramedics checked his vital signs. Only someone significantly disoriented would be so disassociated from his cognitive processes as to fail to bring these serious wounds to the attention of medical personnel."). App. F.

The trial court also relied heavily, in determining that Reinert was able to waive his rights, Opinion on the paramedic's conclusion that Reinert was "conscious, alert, and oriented times three." S.N.T., 8/20/91,12. However, "[e]ven a paranoid schizophrenic may be oriented to three spheres, but still be unable to cognitively understand and rationally waive his Miranda rights." Affidavit Dr. Bornfriend. App. F. Affidavit, Dr. Sadoff. App. G,: Affidavit, Dr. Bornfriend.

INCAPABLE OF WAIVER AFTER SURGERY.

Petitioner allegedly made his most damaging statement to Detective Stauffer while recovering from surgery in his hospital room. Reinert's parents and friends were prevented from seeing him, per police orders, S.N.T., 8/20/91, 149, until after he spoke with the police, S.N.T., 8/21/91, 34. Petitioner was isolated for approximately 8-1/2 hours.

Although Detective Stauffer read Mr. Reinert his Miranda rights, Petitioner's physical and mental condition was such that he was incapable of cognitively waiving those rights.

After sending out the two police officers who were present in Petitioner's room, guarding him, S.N.T., 8/20/91, 135, the two police detectives questioned the Petitioner, who was attached to I.V.s and "banks of monitors or equipment." Id. at 197. They stood on either side of his bed, towering over him, and the curtain was drawn, Id., so that it surrounded his bed and placed him in complete isolation with the two officers. The police testified that to hear the Petitioner they had to lean over his head, while he lay prone and immobile beneath them. Id. at 166. While the two detectives have differing accounts of the incident, Petitioner, per Detective Granitz, allegedly acknowledged the first question (Do you understand these rights) by saying 'yes' and allegedly acknowledged the second (Do you waive these rights) by the equivocal nodding his head. Id. at 188. Detective Stauffer testified that the Petitioner acknowledged both questions with a "yes." Id. at 137. The fact that the Petitioner was capable of nodding his head and/or saying 'yes' or 'yeah' to questions put to him by Officer Zimmerman is not indicative of an intelligent and knowing waiver of his rights, especially given the two detectives present conflicting testimony as to waiver.

The detectives who questioned Petitioner were in a physically oppressive and dominate position, standing over his prone body, while Petitioner, was recovering from emergency surgery in severe pain. Petitioner had just undergone surgery on his life-threatening wounds and been administered with powerful drugs. See Statement of Facts for a recitation of these drugs. Reinert most likely received morphine, a pain reliever, so late after his operation, at 10:00 p.m., Id at 7, only because the other medications he received were effective until then. Affidavit of Dr. Bornfriend, App. F [4]

[4] Dr. Bornfriend, "It was therefore, clear that the narcotic and sedative and muscle relaxant effects of these medications persisted and remained during the course of Mr. Reinert's being interviewed by the police and that when these medications wore off, Mr. Reinert was in severe pain and required 4 mgs. of morphine.

Reinert was unsure of what day of the week it was, and believed it was Monday instead of Sunday. Id. at 164. Petitioner made his statements minutes after the police began questioning him, answering questions for close to forty-five minutes, and only then were his parents, minister, and friend allowed in to see him. S.N.T., 8/21/91, 34. The Detectives traveled to the hospital directly from the police station yet, they failed to bring a tape recorder with them to memorialize their interrogation Reinert. Petitioner's family and friends testified that Reinert told them that he was in pain, and he was difficult to hear or understand. S.N.T., 8/21/91, 69-74. Petitioner's free will was overborne by the totality of the circumstances. Reinert was incapable of knowingly, voluntarily and intelligently waiving his rights. See Affidavit of Dr. Sadoff, App. G ; Affidavit of Dr. Bornfriend, App. F, and supplements, GG and FF.

SUBSEQUENT STATEMENTS TAINTED

Reinert also respectfully requests this Honorable Court, to the extent it determines that any or all of the above statements are inadmissible because they were made in violation of Miranda or were not voluntary, to also declare inadmissible all following statements, since they are "fruit of the poisonous tree." There has been an insufficient showing that the confession was 'an act of free will.'"

All the incriminating statements were made by Reinert within a nine hour period, while he was gravely wounded or in great physical pain, suffering severe mental anguish, under police guard, forcibly isolated from his family and friends, and undergoing pharmaceutical and medical treatment. Each subsequent incriminating statement was dependent on the prior incriminating statement, and Reinert, although allegedly read his Miranda rights twice before making incriminating statements, was not physically or mentally capable of employing the free will necessary to break the causal chain of suppressible statements.

3. Petitioner was denied his Fifth And Sixth Amendment rights to effective assistance of trial counsel, due process, and a fair trial where trial counsel

failed to: (A) call available expert medical and psychiatric witness to testify that Petitioner's physical and mental condition precluded a voluntary statement and/or a knowing, intelligent and voluntary waiver of his Miranda rights at the suppression hearing and/or at trial? (B) inform Mr. Reinert, a person with no prior record, of his right to testify at the suppression hearing? (C) testify, being a percipient witness of the condition of Petitioner at the time of his statement during the suppression hearing and at trial and/or withdrawn if necessary? (4) call an available expert to testify about the drug Prozac per the trial court's ruling - and further where Pennsylvania Courts have failed to order at a minimum an evidentiary hearing on ineffectiveness where no hearing has ever been held?

This case provides the opportunity for this Honorable Court to further evaluate effective assistance of counsel issues to assure that our adversarial system within the criminal justice system is properly functioning and adhering to minimum standards.

Pursuant to Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed 2d 674 (1984) the Sixth Amendment right to counsel is the right to the effective assistance of counsel, and the benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result. Here prior trial counsels performance was fundamentally deficient and it prejudiced Petitioner.

A. Among other things but failing to call expert witnesses (at suppression or trial) who were available and would and could have demonstrated unequivocally that Petitioner due to his severe medical and mental condition was unable to voluntarily give a statement and/or understand and/or knowingly and intelligently waive his constitutional rights, where the statements were critical to the Commonwealth first degree murder prosecution is and must be declared ineffective assistance of counsel.

The attached affidavits of Drs. Sadoff and Bornfriend

demonstrate these contentions. These affidavits were provided and made part of the record in the first appellate court, the Superior Court of Pennsylvania. The Appellate Court failed to provide relief or even order an evidentiary hearing on the matter.

As the Affidavit of Dr. Sadoff states, "Thus, it is for all these reasons that it is my opinion, within reasonable medical certainty, that at the time of the taking of the statement by the police...his [Reinert] mental state was not clear enough for him to be competent to waive his Miranda Warnings or to give a truly voluntary statement." The Affidavit of Dr. Bornfriend states, "Any statements made in the ambulance cannot be considered voluntary, because of his [Reinert] medical and psychiatric condition, and the severity of the medical and psychological stressors in this case leads me to believe with a reasonable degree of medical certainty that Mr. Reinert was incapable of knowingly and intelligently waiving his Miranda Rights." Moreover, Reinert's prior trial counsel was ineffective for failing to call these available expert medical and psychiatric witnesses to testify to the same. These witnesses have persuasively demonstrated that Mr. Reinert, who then was suffering from life-threatening wounds, was medically and psychologically incapable of making a voluntary statement or a valid waiver of his Miranda rights.

B. Trial counsel was ineffective in not informing Petitioner of his right to testify at the Suppression Hearing, not discussing with him the possibility of his so testifying, and not calling him to discuss his physical and mental state on Sunday, March 10, 1991, See Affidavit of Scot A. Reinert, App.H, all of which would have made clear the strength of his suppression motion. Without Reinert's incriminating statements, the prosecution's first degree case would have been seriously undermined. Reinert states in his affidavit:

> My attorneys at no time informed me of my right to testify at my suppression hearing. My testimony at that hearing would have supported the fact that certain evidence should not have been presented at my trial. . . .I was in no condition for police interrogation and certainly unable to understand, let alone waive, my Miranda rights. App.H.

Petitioner stated that his trial counsel did not advise him of his right to testify at the suppression hearing, that he was in no condition for police interrogation and that he was unable to understand or to waive his Miranda rights. Trial counsel's affidavit states that she did not advise Petitioner of his right to testify. See Aff. of Diane Dickson, Esquire. App.K.

C. Trial counsel was ineffective for failing to testify at Petitioner's suppression hearing/trial, as two of his future trial counsel visited him at the hospital on the night of March 10, 1991, N.T., Vol. V, 160. Either of the trial counsel were in a position to testify to the Petitioner's mental and physical condition, See, Aff.Charles and Janet Ketner, App.I, App.J,and then permit the other to remain counsel for the duration of any hearing. See counsel affidavit, K.[5] See Pennsylvania Rules of Professional Conduct, Rule 3.7, especially since the fact-finder at the suppression hearing was a judge, and the jury would be unaware that trial counsel ever acted as a witness. Barring that, counsel should have withdrawn to act as a witness in the proceedings. After the results of the suppression hearing were known, counsel could then determine whether they needed to testify at trial, and if necessary, they should have done so pursuant Rule 3.7, or withdrawn.

D. Reinert's prior counsel was egregiously ineffective in not presenting expert testimony regarding Prozac's suicidal-provoking tendencies. Despite the trial court's refusal to allow lay testimony without corresponding expert testimony, trial counsel never secured, or called to the stand, an expert witness to testify about the effects of Prozac on the victim or other individuals who took the drug, even though

[5] "I arrived immediately after the detectives finished taking Mr. Reinert's statement. I witnessed Mr. Reinert's condition at that time, and in my view he was completely 'out of it'; he was not coherent, was in a great deal of pain, was not in a condition to make a statement, was not competent to make a statement, nor was he capable of understanding or knowingly and intelligently waiving his Miranda rights. App. K para 4. "...no strategic basis for such failure" (to testify). para 5.

Reinert himself presented trial counsel with one such expert. See Affidavits of Charles and Janet Ketner. App.I, App.J. Also see, trial counsel affidavit, K[6] The failure to present this particular evidence prevented Reinert, from providing evidence for the purpose of filling in gaps in the defendant's story, which were created because he could not use the word "Prozac," negating motive, and proving Reinert's state of mind at the time of the stabbing. Prozac caused suicidal or violent tendencies in those that took it, and expert testimony on the drug would have been easily obtained, obviously including herself. Affidavit, Dr. Bornfriend. App.F, App.FF. Further, the drug itself was a very controversial one among the scientific community, and the actual side-effects of Prozac were widely debated. Id. In addition, Dr. Bornfriend's report states that, at the time, Prozac was a source of much familial disharmony between those who took the drug and their loved ones. In all, Dr. Bornfriend reviewed over two pages of information explaining the problems of Prozac, her awareness of those problems, and why it was important to have someone testify about Prozac in regard to Reinert's defense. Her supplemental affidavit further underscores her then availability as a witness. App.FF. Similarly,Dr. Sadoff, GG.

4. Petitioner was denied a fair trial when the trial court declared all lay testimony concerning the victim's use of prozac inadmissible and violated his Fifth and Sixth Amendment Rights.

The right to present evidence in his defense is a fundamental right protected by the U.S. Constitution. Chambers v. Mississippi , 410 U.S. 284, 93 S.Ct. 1038, 35 L.Ed.2d 297 (1973).

The trial court's determination that all lay testimony concerning the victim's use of Prozac was inadmissible deprived the Petitioner of an opportunity to rebut motive, the Commonwealth's theory of the case, an opportunity to

[6] "Although I was provided with a resource to obtain an expert witness for trial regarding Prozac, I unfortunately did not follow through with that information, and no expert was called at trial. There was no strategic basis for such failure. App. K, para. 3.

demonstrate his state of mind and reduced level of intent, and provide the jury with his factual version of events, thereby denying him a fair trial.

CONCLUSION

For all of the foregoing reasons, this Petition for Writ of Certiorari should be granted.

Respectfully submitted,
THEODORE SIMON
Counsel for Petitioner

(2)

Supreme Court, U.S.
FILED

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OFFICE OF THE CLERK

No.

In The
Supreme Court of the United States

October Term, 1996

SCOT A. REINERT,

Petitioner

v.

COMMONWEALTH OF PENNSYLVANIA

APPENDIX TO
PETITION FOR WRIT OF CERTIORARI

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Commonwealth of Pennsylvania	:	In the Superior
	:	Court of
	:	Pennsylvania
	:	
vs.	:	
	:	
Scot A. Reinert,	:	No. 4349
Appellant	:	Philadelphia,
	:	1994

Appeal from the Judgment of Sentence entered November 15, 1994, Court of Common Pleas, Lehigh County, Criminal Division at No. 1128/1991.

BEFORE: JOHNSON, HUDOCK and OLSZEWSKI, JJ.

MEMORANDUM:

Scot A. Reinert appeals from the judgment of sentence imposed following his conviction for first-degree murder. We affirm.

The trial court accurately summarized the facts as follows:

On Sunday afternoon, March 10, 1991, the Allentown Police Department received a call requesting assistance from Charles Ketner, the stepfather of [Reinert]. The police responded to 120 North West Street, Allentown, Lehigh County, Pennsylvania.

Mr. Ketner allowed the police to enter the premises. The police found [Reinert] sitting on the living room floor with dried blood on his clothing and apparent injuries. No one else appeared to be on the first floor.

Emergency Medical Services were called and began treatment of [Reinert]. The medical personnel assisted [Reinert] to the ambulance, at which point, unsolicited,

[Reinert] told them, "I stabbed him with a butcher knife, then I did myself." EMT Snyder, who testified at trial, observed [Reinert] to be coherent and aware at the time the statement was made.

Two Allentown patrolmen accompanied [Reinert] on the ride to the hospital and administered Miranda warnings to [Reinert]. [Reinert] then voluntarily stated, "I stabbed him. I think I killed him."

After arriving at the hospital, [Reinert] spoke with two of the emergency room nurses about what had transpired at the house.

Meanwhile, as [Reinert] was being transported, admitted, and treated, the police secured the crime scene. The police found the victim's body on the third floor, next to the bed. He had been stabbed multiple times.

The police memorialized the scene and proceeded through the house. Numerous items were seized, including the murder weapon and items of clothing. All of the items seized during this initial search were in plain view. Subsequent searches were conducted pursuant to a search warrant.

At the hospital, [Reinert] had surgery to close his wounds. Following surgery, [Reinert]'s doctor judged him to be in stable condition. At that point, [Reinert] was again given Miranda warnings by Detective Joseph Stauffer and Detective Glen Granitz of the Allentown Police Department. Preliminary questions were asked to determine that [Reinert] was coherent and understood the implication of his waiver of Miranda rights.

[Reinert] subsequently gave a statement to the detectives. He indicated that he had lived in an intimate relationship with Sean Brady for five years. On their way back from New York City the previous Friday evening, they had an argument. Upon returning to their home, Sean went up to the third floor bedroom and [Reinert] stayed

downstairs. At some point later that night, [Reinert] picked up a butcher knife, went upstairs, and stabbed Sean. [Reinert] could not recall how many times he had stabbed Sean with the butcher knife.

Testimony revealed that after stabbing Sean, [Reinert] left the bedroom and locked himself in the downstairs bathroom. There he cut his writs and stabbed himself in the abdomen in an apparent suicide attempt. [Reinert] then drifted in and out of consciousness for a period of time. At some point, he exited the bathroom, wrapped his cuts and left the house. He went to a drugstore, where he purchased sleeping pills, and returned home. [Reinert] took some or all of the pills he bought and remained in the home with the victim's body still upstairs.

[Reinert's] mother called the house on Sunday and spoke with her son. Worried by the tone of his voice Mrs. Ketner went to the house with her husband. Upon arriving, the Ketners called the police.

On or about March 10, 1991, [Reinert] was arrested and charged with criminal homicide. . . .

Trial Court Opinion, dated November 15, 1994, at 1-4.

Reinert filed a motion to suppress both the evidence seized without a warrant and his statements to the police and medical staff. The suppression judge, the Honorable Carol K. McGinley, denied this motion. See Opinion, dated September 13, 1991 (Opinion I). Following trial, a jury convicted Reinert of first-degree murder. Reinert filed post-verdict motions which were denied. See Opinion, dated November 15, 1994 (Opinion II). The trial court then sentenced Reinert to a term of life imprisonment. This appeal followed.

For purposes of review, we have renumbered and consolidated Reinert's issues. On appeal, Reinert contends, in essence, that (1) trial counsel was ineffective for failing to (a) call certain witnesses, (b) call one of trial counsel to testify at the suppression hearing, (c) renew Reinert's motion to suppress, (d) inform Reinert of his right

to testify, (e) call an expert to testify about the effects of Prozac, (f) propose proper jury charges regarding the voluntariness of his statements and the doctrine of homicide by misadventure, (g) object to the trial court's jury instructions on character and circumstantial evidence, and for (h) requesting the removal of a juror without Reinert's consent and outside his presence. In addition, Reinert contends that the trial court erred in (2) failing to comply with Pa.R.Crim.P. 323(i); (3) refusing to charge the jury on certain matters; (4) dismissing a juror outside his presence; (5) refusing to allow certain defense exhibits to go out with the jury during its deliberations; (6) denying his motion to suppress certain statements and evidence; (7) declaring all non-expert testimony concerning the victim's use of the drug Prozac inadmissible; (8) refusing to admit a 911 call into evidence; (9) ordering disclosure of attorney work product; (10) allowing the prosecutor to make improper remarks during the closing argument; (11) permitting the Commonwealth's exhibits to go to the jury during its deliberations; (12) granting the Commonwealth's motion to strike and denying the defendant's motion to strike; and (13) permitting the jury to be "life qualified."

First, Reinert contends that his trial counsel was ineffective for various reasons. In order to prove that his counsel was ineffective, Reinert must establish: "1) that the underlying claim is of arguable merit; 2) that counsel's performance was unreasonable; and, 3) that counsel's ineffectiveness prejudiced defendant." Commonwealth v. Williams, 537 Pa. 1, 27, 640 A.2d 1251, 1264 (1994). Further, "[a]n evidentiary hearing is not mandated in every case that ineffectiveness of counsel is raised." Id.

Reinert argues that counsel was ineffective for failing to call a certain witness. Specifically, he contends that counsel was ineffective for failing to call Officer Mertz at the suppression hearing.

In order to establish that counsel was ineffective for failing to call witnesses, Reinert must "establish that: (1) the witness existed; (2) such witnesses were available to testify for the defense; (3) counsel knew of, or should have known of the existence of the witnesses; (4) the witnesses were willing to testify for the defense; and (5) the absence

of the testimony of such witnesses was so prejudicial as to have denied him a fair trial." Commonwealth v. Horton, 434 Pa.Super. 478, 486-87, 644 A.2d 181, 185 (1994). In addition, "counsel will not be deemed ineffective for failing to call witnesses whose testimony is merely cumulative of that of other witnesses." Commonwealth v. Spencer, 432 Pa.Super. 631, 640, 639 A.2d 820, 825 (1994).

After hearing testimony, the suppression court concluded that the search conducted by Officer Stauffer was lawful because he was securing the crime scene and performing a protective walkthrough. Reinert contends that Officer Mertz would have testified that he had already secured the crime scene and performed a protective walkthrough, thus making Officer Stauffer's search unlawful and the evidence he seized inadmissible. However, at the suppression hearing both Officers Zimmerman and Lembach testified that they had secured the crime scene and conducted a protective walkthrough before Officer Stauffer. N.T., August 21, 1991, at 33, 48. Because Reinert has failed to establish that Officer Mertz's testimony would have added anything to the testimony of Officers Zimmerman and Lembach, we find that the absence of his testimony was not so prejudicial as to have denied him a fair trial. In addition, Officer Mertz testimony would have been merely cumulative. Thus, we conclude that counsel was not ineffective for failing to present this testimony.

Reinert also argues that counsel was ineffective for failing to call one of trial counsel at the suppression hearing to testify about his mental state in the hospital. At the suppression hearing, Reinert's mother and step=father, his close personal friend, and a minister all testified as to Reinert's physical and mental state when he was hospitalized. N.T., dated August 20, 1991, at 31-32, 35-38, 44-46, 51-52, 57-61, 68-80. Any further testimony by counsel regarding Reinert's mental state at the hospital would have been cumulative. In addition, Reinert has again failed to show how counsel's failure to testify resulted in prejudice against him. Thus, we conclude that Reinert's claim is without merit.

Reinert contends that trial counsel was ineffective for failing to renew his motion to suppress at trial following the

testimony of Officer Mertz. A court may not reconsider its pretrial suppression ruling unless counsel brings forth new evidence. Pa.R.Crim.P. 323 (J); See also Commonwealth v. Metzer, 430 Pa.Super. 217, 634 A.2d 228 (1993). Reinert baldly asserts that Officer Mertz's testimony at trial produced new evidence that warranted a reconsideration of the court's denial of his motion to suppress. However, Reinert has failed to indicate what alleged new evidence was revealed by that testimony. Because Reinert's underlying claim has no merit, we conclude that counsel was not ineffective for failing to renew the motion to suppress.

Reinert further contends that trial counsel was ineffective for failing to inform him of his right to testify at the suppression hearing. In both his brief to this Court and in his affidavit, Reinert has failed to state with any specificity what his testimony would have been and/or how his testimony would have altered the outcome of the hearing. See Appendix for Appellant at D-1 and D-2. Reinert has failed to establish that his claim has arguable merit, that counsel's actions were unreasonable, or that he suffered prejudice. Thus, we are unable to determine whether counsel was ineffective. William, supra.

Reinert claims that trial counsel was ineffective for failing to call a medical expert to testify at the suppression hearing regarding Reinert's mental condition at the time he made statements to the police and medical staff at the hospital. Specifically, Reinert argues that trial counsel was ineffective for failing to produce such testimony to refute the testimony of police and hospital staff that he was coherent and able to waive his Miranda rights. However, "trial counsel need not introduce expert testimony on his client's behalf if he is able effectively to cross-examine prosecution witnesses and elicit helpful testimony." Commonwealth v. Williams, supra, at 29, 640 A.2d 1265.

After reviewing the record, we find that trial counsel thoroughly cross-examined all of the Commonwealth's witnesses regarding Reinert's mental and physical state at the time he was given Miranda warnings and when he made statements to both the police and the medical staff. N.T., August 20, 1993, at 22-31, 38-45, 58-74, 85-96, 111-20, 122-25, 140-68, 170-76, 181-83, 191-203, August 21, 1991,

at 11-21, 23-27, 83-85. Moreover, we note that the Commonwealth produced overwhelming evidence that Reinert had knowingly and voluntarily waived his Miranda rights. N.T., August 20, 1991, at 11-22, 29, 34-38, 40, 50-55, 76-85, 98-111, 135-40, 187-91; August 21, 1991, at 7-11, 82-84. Thus, we conclude that trial counsel was not ineffective for failing to call medical experts at the suppression hearing. See Williams, supra (counsel was not ineffective for failing to call expert witnesses where he extensively cross-examined police officer doctor regarding their testimony); See also Commonwealth v. Logan, 519 Pa. 607, 549 A.2d 531 (1988) (counsel was not ineffective for failing to employ psychiatric testimony at suppression hearing to demonstrate that defendant's mental illness prevented proper waiver of Miranda rights where evidence indicated defendant was aware of nature of right and consequences of waiver).

Reinert also contends that trial counsel was ineffective for failing to call an expert to testify about the effects of the drug Prozac. St trial, Reinert testified that the stabbing occurred during an altercation in which he was attempting to take a butcher knife away from the victim, who he believed was about to commit suicide. Reinert contends that expert testimony would have established that the victim's use of Prozac may have caused him to develop violent behavior and suicidal tendencies, thus substantiating Reinert's belief that the victim was about to kill himself. "When a defendant claims that some sort of expert testimony should have been introduced at trial, the defendant must articulate what evidence was available and who was willing to offer such evidence." Williams, supra, at 29, 640 A.2d at 1265.

In the present case, Reinert has failed to produce any evidence that there was an expert who was qualified and willing to offer evidence concerning the effects of Prozac at the time of trial. The affidavit of Reinert's medical expert, Dr. Lynn A. Bornfriend, only states that at the time of trial there was concern and discussion in the news about the potential effects of Prozac and her unsupported assertion that "there were many medical experts easily attainable to testify to the effects of and issues surrounding Prozac...."

Affidavit of Dr. Lynn A. Bornfriend, Appendix B-4. Based on the evidence presented, we are unable to conclude that counsel's failure to call a medical expert to testify as to the effects of Prozac was so prejudicial as to have denied Reinert a fair trial. Thus, we conclude that this ineffectiveness claim is without merit.

Finally, Reinert contends that trial counsel was ineffective for failing to propose proper jury charges regarding the voluntariness of his statements and the doctrine of homicide by misadventure; failing to object to the trial court's jury instructions on character and circumstantial evidence; and requesting the removal of a juror without Reinert's consent and outside his presence. We summarily reject all of these contentions because, although Reinert argues that his claims have merit, he has failed to establish that counsel's performance was unreasonable or that counsel's ineffectiveness caused him prejudice. Williams, supra. Thus, we are unable to conclude that counsel was ineffective for failing to propose these jury charges or object to the trial court's jury instructions.

As his second issue, Reinert contends that he is entitled to a new trial because the suppression court failed to comply with Pa.R.Crim.P. 323(i). Specifically, Reinert claims that the suppression court failed to issue findings of fact and conclusions of law with its September 13, 1991 order. However, a review of Judge McGinley's Opinion, dated September 13, 1991, reveals that she set forth both findings of fact and conclusions of law. Thus, we find that this contention is meritless.

Next, Reinert contends that the trial court failed to properly charge the jury on (a) the unreasonable belief aspect

of voluntary manslaughter, (b) the use of less than deadly force to prevent a suicide, (c) circumstantial evidence, and (d) the voluntariness of his statements to the police and medical staff. Any error in the court's instructions to the jury are waived where the appellant failed to object to the instruction when given. Olson v. Washington Country Club, 340 Pa. Super. 168, 489 A.2d 895 (1985). In his brief to this Court, Reinert concedes that trial counsel failed to request the proper instructions on homicide by

misadventure and the voluntariness of his statements to the police and medical staff. Brief for Appellant, at 62, 64. In addition, Reinert concedes that trial counsel failed to object to the trial court's instructions on circumstantial and character evidence. *Id.* at 60-64. Finally, trial counsel stated that she had no objections to the instructions given by the trial court. N.T., supra, at 117-18. Thus, we conclude that these contentions have been waived.

As his fourth issue, Reinert maintains that the trial court improperly granted defense counsel's request to dismiss a juror without this consent or presence. "In order to preserve an issue for review, it must specifically be raised at trial...." Williams, supra at 21, 640 A.2d at 1261. In the present case, we note that it was defense counsel who moved to dismiss this juror. In addition, Reinert has failed to establish that he raised this issue at trial. Further, Reinert has failed to argue that this dismissal was unreasonable or resulted in prejudice. Williams, supra. Thus, we conclude that this contention has been waived.

Next, Reinert claims that the trial court improperly refused to permit the jury to review defense exhibits #8, #24, #25 and #112 during its deliberations. Decisions concerning what exhibits the jury may review during its deliberations are within the sound discretion of the trial court and will not be reversed absent an abuse of the trial court and will not be reversed absent an abuse of discretion. Commonwealth v. Thomas, 372 Pa.Super. 349, 539 A.2d 829 (1988), appeal denied, 520 Pa. 604, 553 A.2d 967 (1988). In the present case, the trial court refused to allow defense exhibit #8 to go out with the jury during its deliberations because it contained notes by defense counsel that referred to unsupported testimony by other witnesses. The trial court also refused to allow defense exhibit #24, a note, to go out with the jury because it contained references to the victim's use of the drug Prozac. Finally, the trial court refused to allow defense exhibit #112 to go out with the jury because it contained hearsay statements by Reinert and his mother. The trial court did allow defense exhibit #25 to go out with the jury and only redacted one sentence, a reference to the victim's use of pills, from the two page document. After reviewing the

contents of these defense exhibits, we conclude that the trial court did not abuse its discretion in refusing to allow them to go out with the jury during deliberations.

In addition, we reject Reinert's contention that he was prejudiced by the fact that white latex gloves were provided to the jury in order to allow them to handle the bloody evidence. Specifically, he claims that potentially, this caused the jury to react with prejudice, and reinforced a negative stereotype attached to homosexuals and concerns over HIV and AIDS. We note that latex gloves are commonly used when handling any blood products, regardless of the amount of blood or the sexual orientation of the source. Thus, Reinert's claim is without merit.

Finally, Reinert contends that the suppression court erred in denying his motion to suppress certain statements and evidence. Reinert also argues that the trial court erred in declaring all non-expert testimony concerning the victim's use of the drug Prozac inadmissible; refusing to admit a 911 call into evidence; ordering disclosure of attorney work product; allowing the prosecutor to make improper remarks during the closing argument; permitting the Commonwealth's exhibits to go to the jury during its deliberations; granting the Commonwealth's motion to strike and denying defendant's motion to strike; and permitting the jury to be "life qualified."

After a review of the record, the briefs of the parties, the applicable law, and the well-reasoned Opinions of the Honorable Carol K. McGinley, it is our determination that there is no merit to Reinert's remaining contentions. Judge McGinley comprehensively discussed and adequately disposed of the question presented. Thus, we affirm issue 6 on the basis of Opinion I, supra, at 5-30.

Judgment of Sentence AFFIRMED.

IN THE COURT OF COMMON PLEAS OF
LEHIGH COUNTY, PENNSYLVANIA
CRIMINAL DIVISION

Commonwealth of Pennsylvania	:	
	:	
vs.	:	No. 1128
	:	of 1991
	:	
Scot A. Reinert,	:	
Defendant	:	

ORDER

NOW, this 15th day of September, 1991, upon consideration of the defendant's Omnibus Pre-Trial Motion and after hearings on August 20 and 21, 1991, and for the reasons stated in the attached Opinion,

IT IS ORDERED that the motion to suppress statements is hereby **DENIED**, and

IT IS FURTHER ORDERED that the motion to suppress evidence is hereby **DENIED**; and

IT IS FURTHER ORDERED that the motion for an individual voir dire is hereby **DENIED**.

BY THE COURT:

_____

CAROL K. McGINLEY

:

IN THE COURT OF COMMON PLEAS
OF LEHIGH COUNTY, PENNSYLVANIA
CRIMINAL DIVISION

Commonwealth of Pennsylvania	:
	:
vs.	: No. 1128
	: of 1991
:	
Scot A. Reinert,	:
Defendant	:

*****

APPEARANCES:

DOUGLAS REICHLEY, Assistant District
Attorney for the Commonwealth

DIANE DICKSON, Esquire
For the Defendant

OMNIBUS PRE-TRIAL MOTIONS TO
SUPPRESS

FINDINGS OF FACT

On Sunday, March 10, 1991, shortly after the noon hour, the Allentown Police Department received a call and responded to 120 North West Street, Alentown, Lehigh County, Pennsylvania. The call came from Charles Ketner, the step-father of the accused. Upon arrival the police were admitted to

the premises by Mr. Ketner.

Upon entering the living room, police observed the defendant sitting on the floor, with apparent injuries from a sharp instrument. The police radioed for Emergency Medical Services. Upon the advice of Mr. Ketner, the police proceeded to the third floor where they observed the body of Sean Brady, dead of apparent stab wounds.

Emergency Medical Services arrived promptly and removed the defendant from the scene to an ambulance and then to Lehigh Valley Hospital Center. Upon the direction of their superior, two Allentown patrolmen accompanied the defendant. As he was being placed in the ambulance, the defendant made certain statements.

Upon arrival at Lehigh Valley Hospital Center, and during and prior to surgery, the defendant also made statements to hospital personnel which were reported to the patrolmen who remained outside of the treatment area upon the instruction of hospital personnel.

Meanwhile, following the transport of the defendant to the Lehigh Valley Hospital Center, Detective Joseph Stauffer and Detective Glen Granitz of the Allentown Police Department arrived at the scene, viewed the body of the victim, memorialized the scene before the body was removed, and proceeded through the house. As they proceeded through the house, Detective Granitz, as "evidence man", seized numerous items, including a butcher knife which appeared to be the weapon used.

Later, at Lehigh Valley Hospital Center, after the patient had resumed consciousness following a laparoscopy under general anesthesia, and with the permission of his attending physician, the defendant was questioned by Detective Stauffer. The defendant was advised of his Miranda reights and then made a statement to Detective Stauffer.

At 11:06, the police returned to the hospital and placed the defendant under arrest.

The defense now seeks to suppress the statements of the defendant, and the use of the evidence seized by the police.

THE STATEMENTS

The scene at 120 North West Street was first discovered by Janet Ketner, the defendant's mother, and her husbanbd, Charles Ketner. On Sunday, March 10, Mrs. Ketner placed a call to Scot Reinert about 11:30 in the morning to inquire about plans which had been made for later in the day. When he answered the phone he sounded confused and said things that did not make sense to Mrs. Ketner. He told her that people were running through the house, people like the KKK, chasing him. He also told her something about a body. When she asked where Sean was, he told her that Sean had gone out with friends for the day. He further told her that he wanted to go to a hospital.

Naturally alarmed by such a conversation, Mrs. Ketner and her husband promptly came to the house. Mr. and Mrs. Ketner let themselves into the house with a key and saw Scot sitting on the floor by the sofa. Mrs. Ketner observed that he looked "strange". After seeing that his injuries were not "too bad", Mrs. Ketner decided to "check out the body thing", went to the third floor and discovered the body of the victim.

Mrs. Ketner also testified that at this initial meeting Scot incorrectly insisted that family members had been there recently.

Charles Ketner also observed the defendant at the initial juncture and noted that his eyes were wide, darting back and forth. He also noted that the defendant was thick-tongued and especially soft spoken. He further testified that the defendant claimed that the police had also been there recently.

Also observing the defendant at the scene were Officers Robert Lembach and Bruce immerman of the Allentown Police Department. Officer Zimmerman was one of the officers who arrived in response to the initial call. Officer Zimmerman

testified that he asked the defendant his age and his phone number, and that the defendant gave appropriate and accurate responses.

Also arriving at the scene in the initial stages was Tim Snyder, the paramedic crew chief of the Emergency Medical Service Unit. He observed the defendant seated on the floor in front of the sofa, apparently in the same position where he had first been discovered by his mother and the police. The defendant was awake, alert and oriented. Mr. Snyder observed, as had others, that the defendant had gash marks on both wrists, which were not actively bleeding.

Mr. Snyder and other paramedics took him to the ambulance in the company of Officers Zimmermand and Robert Lembach. As the defendant was being escorted out of the house, he made an attempt to reach for nearby crutches, which he had been apparently using because of pain in an injured foot.

In the ambulance, paramedic Snyder made a vital signs and physical assessment of the defendant. In addition, he asked the defendant certain questions to determine his orientation, and concluded that he was oriented in three spheres.

Also in the course of the examination Mr. Snyder observed another wound, this one to the stomach area. As is customary, the paramedic asked him what had happened. The defendant responded "I stabbed him".

At that point Officer Zimmerman advised the defendant of his Miranda rights, and the defendant indicated that he understood his rights and that he wished to make the statement. Officer Zimmerman then asked him what had happened and the defendant repeated his statement that he had stabbed the victim with a butcher knife and then "did myself".

The defendant remained conscious, alert and oriented throughout his transport to the hospital. No

medication was administered to him while in the care of the Emergency Medical Service Unit.

Once at the hospital the defendant was treated in the emergency room, and was under the care of nurses Thomas Gavin and Patricia Lombardo. In the course of that treatment the medical personnel asked him questions, both to obtain information and to determine the defendant's physical and mental condition. During this period of time the only medication administered to the defendant was an antibiotic. He remained alert and coherent. He responded to questions concerning allergies to medication and to the approximate time of his most recent tetanus inoculation. He indicated he was allergic to penicillin. Ms. Lombardo observed that his blood pressure was stable, that his pulse was providing him with adequate oxygenation to the brain, and she performed the Glasgow coma score to determine his level of consciousness. In all categories, the defendant received the highest possible score.

Because of the nature of some of the injuries to the defendant, i.e. slashed wrists, Nurse Lombardo asked questions to determine his mental state in the event that close supervision would be required to prevent the defendant from attempting to harm himself. She asked him whether he had inflicted the wounds on himself. He replied "Well, ... Some".

The substances administered to the patient thus far in the course of his treatment were non-sedating and non-narcotic, and no medical personnel noticed a change in the defendant's mental perception or clarity following the administration of any substances.

The defendant's medical chart contained later indications that the defendant was allergic to penicillin, codeine and sulfa.

The defendant was in surgery from approximately 1:00 P.M. to 3:00 P.M. He was returned to the Shock Trauma Unit from the recovery

room at approximately 2:05 P.M.

At 7:47 P.M. Detective Stauffer arrived at the hospital with Detective Granitz. After speaking to the attending physician, Dr. Homayoun Hashemi, the detectives proceeded to interview the patient. The questioning began at least five hours after the defendant's surgery had been completed.

Detective Stauffer determined that the patient was conscious and oriented. He asked him his date of birth and his social security number, both of which were later verified as accurate. he asked him other questions to determine whether or not the defendant was aware of his surroundings and received satisfactory answers.

After determining that the defendant was able to be responsive, Detective Stauffer advised him of his rights, following which the defendant said he understood his rights and he agreed to speak with the police. Detective Granitz also asked questions to determine the capacity of the defendant, both at the beginning and the end of the statement.

The defendant, upon questioning by Detective Stauffer, made incriminating statements. In the course of making these statements the defendant was voluble, and volunteered information not specifically sought by Detective Stauffer. The questioning ended at 8:30 P.M.

Dr. Hashemi testified that he had performed a post-operative check at 7:30 P.M. on the defendant, that he had seen that the defendant was awake, coherent, and had stable vital signs. His chart indicated no abnormality with regard to the defendant's ability to answer questions appropriately. Dr. Hashemi also testified that the first administration of medication for pain, specifically morphine, was not administered to the defendant until 10:00 P.M.

Immediately following his statements to the police, the defendant was seen by his family, his close friend Cindy Mellinger, and his mother's minister. All testified that he was extremely soft-

spoken at this time.

THE EVIDENCE

At 12:40 P.M. Detective Stauffer arrived at the scene accompanied by Detective Glen Granitz and shortly thereafter Sergeant Thomas Moyer of the Identification Unit arrived. The officers took pictures of the scene, made physical determinations concerning the body, and obtained formal identification of the body.

The officers then proceeded to go through the house to determine if there were any other persons present who may have been involved in the death of Sean Brady and injury to the defendant. As the police proceeded through the house they observed certain items relevant to the incident, such as blood-stained articles. In the bathroom on the second floor they observed a butcher knife, as well as a razor blade, scissors, and a large amount of blood. These items, as well as clothing and articles stained with blood located throughout the house were picked up by Detective Granitz and seized as evidence. Their possession was noted on an inventory prepared by the police (Exhibit C-9).

All items seized by the police were in plain view.

DISCUSSION OF LAW

STATEMENTS

The defense challenges the voluntariness of the statements given by the defendant. The constitutional principles of the Fifth and Fourteenth Amendments protect the defendant from the use of his own statements against his interests. U.S. Const. Amnends. V. XIV. In order for the Commonwealth to use any statements of the defendant, they must show that there was a voluntary waiver of this rights. Rogers v. Richmond, 365 U.S. 534, 81 S.Ct. 735, 5 L.Ed.2d 760 (1961). The test to be applied in evaluating the voluntariness of the statements is one of the

"totality-of-circumstances." This test is discussed in the case of Commonwealth v. Smith, 470 Pa. 220, 225-26, 368 A.2d 272 (1977), quoting Commonwealth v. Alston, 456 Pa. 128, 133-34, 317 A.2d 241, 243 (1974) as follows:

... the ultimate test for voluntariness is whether the confession is the product of an essentially free and unconstrained choice by its maker. "If it is, if he has willed to confess, it may be used against him. If it is not, if his will has been overborne and his capacity for self-determination critically impaired, the use of his confession offends due process. Rogers v. Richmond, 365 U.S. 534, 81.S.Ct. 735, 5 L.Ed.2d 760. The line of distinction is that at which governing self-direction is lost and compulsion, of whatever nature or however infused, propels or helps to propel the confession." Culombe v. Connecticut, supra, 367 U.S. at 602, 81 S.Ct. at 1879 (1961); see also Commonwealth ex rel. Butler v. Rundle, supra, 429 Pa. at 149, 239 A.2d 430 (1968); Commonwealth v. Eiland, supra, 450 Pa. at 574, 304 A.2d at 476 (1973); Commonwealth v. Banks, 454 Pa. 401, 407, 311 A.2d 576, 579 (1973). An evaluation seeking to determine whether a confession is involuntary because of psychological coercion must consider those elements impinging upon a defendant's will such as: the duration, and the methods of interrogation; the conditions of detention, and the manifest attitude of the police toward the defendant, the defendant's physical and psychological state and all other conditions present which may serve to drain one's powers of resistance to suggestion and undermine his self-determination. See Culombe v. Connecticut, supra, 367 U.S. at 602, 81 S.Ct. at 1860; Commonwealth ex rel. Butler v. Rundle, supra. 429 Pa. at 151, 239 A.2d at 431; Commonwealth v. Eiland ,- supra, - 450 Pa. at 574, 301 A.2d at 654; Commonwealth v. Riggins, supra, 451 Pa. at 525, 304 A.2d at 476; Commonwealth v. Banks, supra, 454 Pa. at 407, 311 A.2d at 579. As we have noted, when the question of voluntariness

passes beyond the realm of physical coercion and into degrees of psychological coercion, most careful attention will be afforded to any facts, circumstances or events tending to overbear the will of the accused. Commonwealth ex rel. Butler v. Rundle, supra, 429 Pa. at 149, 239 A.2d at 430.

The Pennsylvania courts have recognized that physical injury affects the ability of a defendant to give a voluntary, knowing and intelligent statement. Commonwealth ex rel. Gaito v. Maroney, 422 Pa. 171, 220 A.2d 628 (1966). The burden is one of preponderance on the Commonwealth to establish the voluntariness of the defendant's statements. Lego v. Twomey, 404 U.S. 477, 92 S.Ct. 619, 30 L.Ed.2d 618 (1972); Commonwealth V. Moore, 454 Pa. 337, 311 A.2d 620 (1973).

We now address the voluntariness of the statements given after the Miranda warnings by applying the "totality-of-circumstances" criteria to the facts at hand.

We address the statements separately. The first statement is that statement volunteered by the defendant to paramedic Snyder. At the time the statement was made, it was volunteered by the defendant in response to a routine question by paramedic Snyder. It was not solicited by the police.

Furthermore, although the police were present, there is nothing in the situation which would lead a reasonable man to believe that he was under arrest or in the custody of the police. The arrival of the police at the scene was due to a request made on his behalf by his mother and her husband, and the defendant's transport to the Hospital Center was voluntary on his part. The mere fact that police were present was not in any way indicative that the defendant was in their custody. Their presence could be explained by many things, including a desire to interview an important witness or a desire to protect a potential victim.

We conclude, therefore, that the statement

made to paramedic Snyder was not made while the defendant was in custody and, furthermore, that it was not made pursuant to interrogation by police officers.

The next statement made by the defendant was a statement given to Officer Zimmerman in the ambulance. Prior to this statement, Officer Zimmerman advised the defendant of his Miranda rights, following which the defendant indicated that he wished to answer questions. The defendant contends that the waiver of his Miranda rights was not voluntary because of his mental and physical state.

We conclude that his mental and physical state was such that he was conscious, alert, and oriented in three spheres. That being the situation, there is no reason to question the quality of his waiver. Furthermore, the Smith case, in summarizing the state of the law concerning the voluntariness of statements speaks to whether the statement is the result of coercive techniques on the part of the police, whether physical or psychological. The interview by Officer Zimmerman was brief, the interrogation routine, and the detention basically the result of circumstances created by the defendant. Clearly there was no physical threat to the defendant from the police inasmuch as the interview took place in the ambulance in the presence of paramedics. We firmly conclude that there was no physical or psychological coercion in the situation, nor in the questioning technique used by Officer Zimmerman.

There were also statements made to the nurses in the emergency room while the defendant was being treated. The police were not present, nor were any questions asked by hospital personnel upon the request of the police. Although the statements of the defendant were reported to the police upon their request, there is simply no issue of interrogation by the police, custodial or otherwise, with regard to the emergency room statements.

The final statement to be considered is that statement given by the defendant to Detective Stauffer.

The duration of the interrogation was relatively short, and the defendant volunteered incriminating statements early in the interrogation. The method of interrogation involved no coercion, threats or any other similar technique that would pressure the defendant and compromise his willingness to make a statement.

Although interviews in a hospital setting are "extremely suspect" according to the Commonwealth v. Perry, 475 Pa. 1, 379 A.2d 545 (1977), there are many instances where hospital interviews have been deemed appropriate. See Commonwealth v. Webb, 491 Pa. 329, 421 A.2d 161 (1980); Commonwealth v. McQuaid, 273 Pa.Super. 600, 417 A.2d 1210 (1980); Commonwealth v. Harm, 272 Pa.Super. 431, 416 A.2d 533 (1979); and Commonwealth v. Hunt, 263 Pa.Super. 504, 398 A.2d 690 (1979).

In the present case, Detective Stauffer conducted an interview of the defendant at the hospital room. Preliminarily, Detective Stauffer asked the defendant a few routine questions to establish his condition. The answers given by the defendant were later verified as correct (such as birthdate, social security number, etc.). Detective Stauffer testified that the witness understood what was happening and freely waived his right to remain silent.

It should also be noted that Detective Stauffer conferred with the defendant's doctor and inquired about his condition prior to the interview. The doctor, who had just done a post-operative check on the defendant, thought the defendant was capable of answering Detective Stauffer's questions. See Commonwealth v. Hunt, 263 Pa.Super. 504, 398 A.2d 690 (1979).

Throughout the questioning, the defendant seemed alert, attentive and showed a willingness to

make the statements. The defendant did not ask for a lawyer and indicated that he wanted to talk to the Detective after the Miranda warnings had been given. He also volunteered information that was not in response to questions asked by the officers.

Testimony of the officers reveals that there is no indication that the defendant was in debilitating pain, nor were there any pain-controlling drugs administered to the defendant until after the interview. Both the officers and the treating physician evaluated the defendant as being aware of the choices he was making, and we so conclude.

EVIDENCE

The defendant challenges the seizure of physical evidence from 120 North West Street.

The protections of the Fourth Amendment are aimed at preventing unreasonable searches and seizures. U.S. v. U.S. District Court , 407 U.S. 297, 92 S.Ct. 2125, 32 L.Ed.2d 752 (1972). Although all warrantless searches and seizures are per se and reasonable, Commonwealth v. Gabrielle , 269 Pa.Super. 338, 409 A.2d 1173 (1979). We find that the plain view exception to the need for a warrant announced in Coolidge v. New Hampshire, 403 U.S. 443, 91 S.Ct. 2022, 29 L.Ed. 2d 564 (1971), applies to the facts at hand.

The case of Arizona v. Hicks , 480 U.S. 321 94 L.Ed.2d 347, 107 S.Ct. 1149, 55 U.S.L.W. 4258 (1987) discusses the standards to be used in determining whether the exception if applicable. The plain view doctrine contains three elements that must be met. Initially the police officer needs to be lawfully at the scene where the evidence is viewed. Secondly, the evidence viewed needs to be discovered unintentionally. Lastly, there needs to be probable cause to suspect the evidence is contraband. Arizona v. Hicks, supra . See also Commonwealth v. Person, 385 Pa.Super. 197, 560 A.2d 761 (1989); Texas v. Brown, 460 U.S. 730. 75 L.Ed.2d 502, 103 S.Ct. 1535 (1983); Commonwealth v. Chiesa , 329 Pa.Super. 401, 478 A.2d 850 (1984).

Applying these standards to the case at bar, we find that the police officers were lawfully at the scene investigating the dealth of Sean Brady. The police officers were called to the scene and were requested to enter the home by Mr. Ketner. As part of this investigation, they were justified in walking through the home and making sure it was secure. This included walking into every room, making sure that doors and windows were closed and that no other suspects or witnesses were present in the home.

The second part of the Arizona v. Hicks test requires that the evidence be discovered unintentionally. It is clear from the facts that the police officers were not searching the house for evidence, but rather securing the premises. Additionally, it should be noted that the search did not include the opening of drawers or closed containers.

The reasonableness of a security check is addressed in the case of U.S. v. Agapito, 620 F.2d 324 (CA2 NY 1980), cert. denied 449 U.S. 834, 101 S.Ct. 107, 66 L.Ed. 2d 40 (1980). After weighing the intrusion of the privacy right of the individual with the public interest, the court found that the public interest outweighed the private interest due to the fact that the delay in time involved in getting a warrant would allow time for evidence to be destroyed and endanger the safety of officers who might encounter accomplices within the building. See also Comm. v. Curry. 343 Pa.Super. 400, 494 A.2d 1146 (1985).

The case of Mincey v. Arizona, 437 U.S. 385, 57 L.Ed. 2d 290, 98 S.Ct. 2408 (1978) is also distinguishable from the case at bar. In Mincey, the police responded to a shooting. The officers enbtered the apartment and requested medical assistance. Within ten minutes of the call, homicide detectives arrived at the scene and began a warrantless search of the premises which lasted four days and involved a full-scale search and seizure. The U.S. Supreme Court determined that this

activity was a violation of the defendant's Fourth Amendment rights based on the fact that there were no "exigent circumstances" present to justify the search without a warrant.

In the present case there was an injured victim on the first floor of the house and a dead victim on the third floor. The police and emergency crew were summoned and no one was aware of the circumstances surrounding the injuries and death at this time. The police and emergency crew were summoned and no one was aware of the circumstances surrounding the injuries and death at this time. The police officers had a reasonable belief that others may be in the house that could destroy evidence or endanger the lives of the officers. The search was reasonably brief and was conducted within a short time span of the preceding events. Also, a search warrant was obtained at a later time. Based on these facts, a security check of the premises by the police officers was reasonable and did not violate the Fourth Amendment rights of the defendant.

The third requirement of Ariona v. Hicks mandates that there must be probable cause to suspect the evidence is contraband. There is no real issue raised by the defendant that the police did not have probable cause to believe that the items seized were contraband.

Because all three prongs of the plain view exception have been met in the present case, the court finds that the search and seizure of 120 North West Street was proper and that there was no violation of the defendant's Fourth Amendment rights.

CONCLUSION

Based on the above-stated findings of fact and conclusions of law, we find that none of the defendant's constitutional rights wsere violated. Therefore, the statements by the defendant and the evidence seized by the police are not subject to suppression.

IN THE COURT OF COMMON PLEAS
OF LEHIGH COUNTY, PENNSYLVANIA
CRIMINAL DIVISION

Commonwealth of Pennsylvania	:	
	:	
vs.	:	No. 1128/1991
	:	
Scot A. Reinert,	:	
Defendant	:	

ORDER

NOW, this 15th day of November, 1994, upon consideration of the post-trial motions of the defendant, Scot A. Reinert, as well as the briefs and argument of counsel.

IT IS ORDERED that the post-trial motions are hereby DENIED AND DISMISSED for the reasons stated in the accompanying Opinion.

BY THE COURT:

_____
CAROL K. McGINLEY

_____
THOMAS A. WALLITSCH

IN THE COURT OF COMMON PLEAS
OF LEHIGH COUNTY, PENNSYLVANIA
CRIMINAL DIVISION

Commonwealth of Pennsylvania	:	
	:	
vs.	:	No. 1128/1991
	:	
Scot A. Reinert,	:	
Defendant	:	

* * * * *

APPEARANCES:

Douglas Reichley, Assistant District Attorney
For the Commonwealth

Diane Dickson, Esquire, with her
Wallace C. Worth, Esquire
For the Defendant

* * * * *

OPINION

CAROL K. McGINLEY, J.

Before us are the post-trial motions of the defendant, who was convicted of first degree murder and sentenced to life imprisonment. The victim, the defendant's lover, was stabbed to death, and was discovered by police two days after the murder, when the defendant's stepfather called for help.

On Sunday afternoon, March 10, 1991, the Allentown Police Department received a call requesting

assistance from Charles Ketner, the stepfather of the defendant. The police responded to 120 North West Street, Allentown, Lehigh County, Pennsylvania.

Mr. Ketner allowed the police to enter the premises. The police found the defendant sitting on the living room floor with dried blood on his clothing and apparent injuries. No one else appeared to be on the first floor.

Emergency Medical Services were called and began treatment of defendant. The medical personnel assisted the defendant to the ambulance, at which point, unsolicited, the defendant told them, "I stabbed him with a butcher knife, then I did myself." EMT Snyder, who testified at trial, observed the defendant to be coherent and aware at the time the statement was made.

Two Allentown patrolmen accompanied the defendant on the ride to the hospital and administered Miranda warnings to the defendant. The defendant then voluntarily stated, "I stabbed him. I think I killed him."

After arriving at the hospital, the defendant spoke with two of the emergency room nurses about what had transpired at the house.

Meanwhile, as the defendant was being transported, admitted, and treated, the police secured the crime scene. The police found the victim's body on the third floor, next to the bed. He had been stabbed multiple times.

The police memorialized the scene and proceeded through the house. Numerous items were seized, including the murder weapon and items of clothing. All of the items seized during this initial search were in plain view. Subsequent searches were conducted pursuant to a search warrant.

At the hospital, the defendant had surgery to close his wounds. Following surgery, the defendant's doctor judged him to be in stable condition. At that point, the defendant was again given Miranda warnings by Detective Joseph Stauffer and Detective Glen Granitz of the Allentown Police Department. Preliminary questions were asked to determine that the defendant was coherent and understood the implication of his waiver of Miranda rights.

The defendant subsequently gave a statement to the detectives. He indicated that he had lived in an intimate

relationship with Sean Brady for five years. On their way back from New York City the previous Friday evening, they had an argument. Upon returning to their home, Sean went up to the third floor bedroom and the defendant stayed downstairs. At some point later that night, the defendant picked up a butcher knife, went upstairs, and stabbed Sean. The defendant could not recall how many times he had stabbed Sean with the butcher knife.

Testimony revealed that after stabbing Sean, the defendant left the bedroom and locked himself in the downstairs bathroom. There he cut his wrists and stabbed himself in the abdomen in an apparent suicide attempt. The defendant then drifted in and out of consciousness for a period of time. At some point, he exited the bathroom, wrapped his cuts and left the house. He went to a drugstore, where he purchased sleeping pills, and returned home. The defendant took some or all of the pills he bought and remained in the home with the victim's body still upstairs.

The defendant's mother called the house on Sunday and spoke with her son. Worried by the tone of his voice Mrs. Ketner went to the house with her husband. Upon arriving, the Ketners called the police.

On or about March 10, 1991, the defendant was arrested and charged with criminal homicide. A suppression hearing was held on august 20 and 21, 1991, which motions were disposed of by Order and Opinion on September 13, 1991.

The evidence against the defendant at trial consisted of, among other things, the butcher knife used to kill Sean Brady, the victim's t-shirt, the sheets on the bed where Sean was stabbed, photos of the crime scene, a videotape depicting the condition of the house and the body when police arrived, the statements made by the defendant, and the observations of witnesses.

After conviction and sentencing, the defendant filed post-trial motions, which were argued en banc April 3, 1993, and June 3, 1992.

There are twenty-three (23) issues before the court on defendant's post-trial motions. For the sake of clarity, some of the related issues will be discussed simultaneously.

I. Statements and Evidence

The defendant contends that the court erred in denying the defendant's motion to suppress all statements made by him, and in refusing to suppress all evidence seized from his home at 120 North West Street, Allentown, Lehigh County, Pennsylvania. For the reasons stated in the Order and accompanying Opinion dated September 13, 1993, we find that the statements and evidence were correctly admitted.

II. Prozac

The defendant also argues that the court erred in precluding any testimony referring to the prescription drug Prozac, which the victim was allegedly taking at the time of his death. The defense intended to introduce the fact that the victim was taking Prozac to show that it was one of the things the defendant and the victim were fighting about, as well a to demonstrate the defendant's concern for the victim.

When the proposed questions for voir dire were submitted, the Commonwealth filed a motion in limine to preclude all voir dire questions and testimony referring to Prozac. The court ruled that no questions or testimony would be permitted concerning Prozac absent expert testimony.

The defense contends that Prozac is analogous to alcohol, and as such, we should follow established case law with regard to the admissibility of testimony. With alcohol testimony as to what a specific percentage of alcohol in the blood indicates with regard to intoxication or the effect of a certain percentage of alcohol on the mental and physical capacities of a person must come from an expert witness. Commonwealth v. Guiliano , 274 Pa. Super. 427, 418 A.2d 476 (1980). However, a lay person can give an opinion as to intoxication from alcohol, which can be drawn from observations of the person's demeanor and appearance. Commonwealth v. Reynolds, 256 Pa. Super. 259, 389 A.2d 1113 (1978).

While the defense urges we take this position, we cannot accept the proposition that Prozac is the same as alcohol. First, a layperson can testify as to intoxication because of the widespread use of alcohol in our society. That prevalence qualifies a lay person to render an opinion

on the subject. The same can not be said of the controversial drug Prozac. Not only is the use of Prozac not as common as the use of alcohol, but there is uncertainty and debate as to its effects. (For some discussion regarding the controversy over Prozac see Church of Scientology International v. Eli Lilly & Co., 778 F. Supp. 661 (1991) and the articles discussed therein). Without any expert testimony, the jury would be left to speculate about Prozac and its impact. (Other jurisdictions, while not ruling specifically on whether an expert is required to testify on the effects of Prozac, have had several cases where Prozac was involved and an expert testified; Boswell v. State, 610 So.2d 670 (1992); Garza v. State, 829 S.W.2d 291 (1992)).

Additionally, the defense was certainly permitted at trial to establish the defendant's concern for Sean Brady through other means. The court allowed unlimited testimony about the victim's behavior, provided that the defendant did not speculate before the jury that the victim's alleged troublesome behavior was caused by Prozac. Moreover, Prozac was not the only point of contention between the victim and Sean and was not the sole reason for the breakdown of their relationship. Therefore, the issue of Prozac was not relevant to the case, nor would it serve to do anything other than distract the jury and lead to speculation. Any probative value of the testimony regarding Prozac, without the aid of expert testimony, was outweighed by the potential for prejudicial impact.

III. "Life-Qualification" Questions During Voir Dire

The defendant objects to the Commonwealth's questions during voir dire concerning "life-qualification." The questions were: (1) "If the defendant is convicted of murder in the first degree, the sentence to be imposed would be life imprisonment. Do you have any preconceived opinions about someone receiving a sentence of life imprisonment?" and (2) "Do you believe your feelings or opinions about a sentence of life imprisonment would allow you to sit fairly and impartially as a juror if the Commonwealth proved the Defendant was guilty of murder in the first degree?"

We start by noting that the scope of voir dire rests in the sound discretion of the trial judge. Commonwealth v. Sparrow, 471 Pa. 490, 370 A.2d 712 (1977) (overruled on

different grounds by Commonwealth v. Tarver, 493 Pa. 320, 426 A.2d 569 (1981)). The decision of the trial judge will not be reversed unless palpable error is established. Sparrow, 370 A.2d 712.

Case law has established that it is within the realm of permitted questioning to ask during voir dire whether a potential juror has any predisposition towards returning a verdict that may result in life imprisonment. Commonwealth v. Kingsley, 480 Pa. 560, 391 A.2d 1027 (1978); Commonwealth v. White, 366 Pa. Super. 538, 531 A.2d 806 (1987); Commonwealth v. Haynes, 395 Pa. Super. 322, 577 A.2d 564 (1990). alloc. denied, 589 A.2d 689 (1990). This line of questioning is consistent with the purpose of voir dire, which is to provide the accused with a competent, impartial and unprejudiced jury. Commonwealth v. Hathaway, 347 Pa. Super. 134, 500 A.2d 443 (1985).

The questions asked by the Commonwealth in this case are permissible. The contention of the defendant that the phrase "without parole" should have been added to the questions has no basis. As the court pointed out at the time defense counsel objected to the life-qualifying questions, "without parole" is not an element of the crime, but rather a modifier. 18 P.S.C. §1102; See N.T. 1/15/92, p. 3. Furthermore, defense counsel offers no authority to support its contention that the questions were improper without that modifier.

IV. Venirepersons 15, 32, 42

The defendant challenges the court's ruling concerning three potential jurors. Venireperson 15 was stricken for cause, Venireperson 32 was stricken for cause, and the Court declined to strike Venireperson 42 for cause.

The transcript as to Venireperson 15 Roger Hahn is unclear as to who even challenged him for cause. However, it was established that Mr. Hahn was related to a police officer and this indicates that there was sufficient basis to strike him for cause. (N.T. 1/15/92, p. 4).

With regard to Venireperson 32, Michael D'Alessandro, the record is quite clear as to the court's basis for striking him for cause. Mr. D'Alessandro's father has a case pending in Lehigh County and his son was a witness for him. The litigant was being represented by Worth Law

Offices, who represented the defendant in this case. (N.T. 1/15/92, p. 3-8).

Venireperson 42, John Heiney, was not stricken for cause. Defense counsel requested that he be stricken because he had worked at the same place as Detective Granitz' father. However, he had not known the detective's father well, nor had he seen him in two years. (N.T. 1/15/92, p. 2). More importantly, Mr. Heiney did not know Detective Granitz at all. (N.T. 1/15/92, p. 2). There is nothing to indicate that Mr. Heiney would be unable to render a fair and impartial decision in this case.

V. Photos, Clothes, and Videotape

a. Photos

The defendant contends that the Court erred in allowing the Commonwealth to introduce four photographs (Commonwealth Exhibits 42-45). The black and white pictures depicted the victim's body from various angles.

In making this determination, the Court first had to decide if the pictures had inflammatory characteristics. Commonwealth v. Hudson, 489 Pa. 620, 414 A.2d 1183 (1980). To be inflammatory, "the depiction must be of such a gruesome nature or be cast in such an unfair light as to cloud an objective assessment of the guilt or innocence of the defendant." Commonwealth v. Hubbard, 472 Pa. 259, 281, 372 A.2d 687, 697 (1977). Having blood visible in a picture does not make it inflammatory per see. Hudson 414 A.2d at 1381.

If the pictures are not deemed inflammatory, the photos are admissible, subject to a determination of relevance and whether they can assist the jury. Commonwealth v. Gilman, 285 Pa. 145, 401 A.2d 335 (1979). If inflammatory, the pictures are admissible if they are "of such essential evidentiary value that [its] need clearly outweighs the likelihood of inflaming the minds and passions of the jurors." Commonwealth v. McCutchen, 499 Pa. 597, 602, 454 A.2d 547, 549 (1982).

The black and white photographs in the case at bar are not inflammatory. (See also N.T. 1/16/92, p. 83). They are similar in nature to those that were permitted in Commonwealth v. Reed, 400 Pa. Super. 207, 583 A.2d 459 (1990), alloc. denied, 598 A.2d 282 (1990), where the

pictures depicted cleaned bullet wounds, including one to the victim's face. Not only were the pictures not deemed inflammatory in that case, but the Court found the pictures depicting the location of the victim's wounds were relevant to support the inference of a specific intent to kill. Reed, 583 A.2d at 466. The Court distinguished the photos before them from the ones in Commonwealth v. Scaramuzzino, 455 Pa. 378, 317 A.2d 225 (1974). Those pictures were in color and showed the victim's heart removed from his body, as well as a nude torso covered with dried blood and glass rods sticking out to show the direction of the various wounds.

The photographs in this case were relevant, particularly in regards to the determination of specific intent necessary for a finding of first degree murder.

b. Clothes

The defendant also contends in his post-trial motions that Sean Brady's short should not have been introduced into evidence. The same principles that govern photographs are applicable to a determination of admissibility of a victim's clothing. Commonwealth v. Martinez, 475 Pa. 331, 380 A.2d 747 (1977). We find that the shirt in question was not inflammatory and was relevant and, therefore, admissible.

c. Videotape

The defendant raises a error that the court allowed the Commonwealth to show to the jury a videotape of the murder scene. The videotape was of the residence of the victim and the defendant at 120 N. West Street and was taken within hours of arrival of the police to the crime scene.

Show in the video was the scene from the front door, followed by the living room area where the defendant was found by the police, then the dining room, the kitchen and the remainder of the first floor. The tape then shows the stairway, the two bedrooms on the second floor, the bathroom, and concludes with the third floor bedroom where the victim's body was found, and the body in the room.

After viewing the tape before trial, in the presence of defense counsel and the Assistant District Attorney, the court specifically made a finding that the video was not inflammatory and that the evidentiary value of the tape

outweighed any potential prejudice. (N.T. 1/16/92, p. 83). Additionally, the court gave a limiting instruction to the jury prior to the showing of the video at trial and indicated that the tape was "not to inflame them", but to assist them. (N.T. 1/21/92, p. 101).

The tape was relevant in conveying to the jury the layout of the house and the condition in which it was found. Furthermore, it assisted the jury in following the defendant's later testimony as to the prolonged sequence of events he described from the stabbing of Sean until the police arrived.

VI. The Testimony of Nurse as Expert

The defendant alleges that the Court erred in permitting the testimony of Thomas Gavigan, a registered nurse, who participated in the care of the defendant upon his arrival at the hospital. The Court permitted Nurse Gavigan to testify as an expert and render an opinion as to whether certain stab wounds of the defendant were self-inflicted.

The standard for qualification of an expert is liberal in Pennsylvania. If a witness "has any reasonable pretension to specialized knowledge on the subject matter under investigation he may testify and the weight to be given to his evidence is for the [fact-finder]." Commonwealth v. Gonzalez, 519 Pa. 116, 546 A.2d 26 (1988), (citing Kuisis v. Baldwin-Lima-Hamilton Corp., 457 Pa. 321, 319 A.2d 914 (1974) and Moodie v. Westinghouse Electric Corp., 367 Pa. 493, 80 A.2d 734 (1951)). Furthermore, expertise in a particular field may be based on practical, occupational, or other experimental training and does not need to be obtained purely through academic training. Commonwealth v. Ellis, 354 Pa. Super. 11, 510 A.2d 1253 (1986).

Nurse Gavigan graduated college in 1983 with an associate's degree in Nursing. (N.T. 1/17/92, p. 195). He had worked in a hospital in New York for two years prior to coming to Lehigh Valley Hospital Center. After working at the hospital for a year, he moved to the emergency room, where he was stationed for more than six years prior to the trial. (N.T. 1/17/92, p. 178). In addition to the trauma training received at the hospital, Nurse Gavigan had actually treated approximately one hundred patients with stab wounds.

(N.T. 1/17/92, p. 179, 185). About half of the patients he treated had self-inflicted wounds. (N.T. 1/17/92, p. 192).

Based on these qualifications, Nurse Gavigan was qualified as an expert. He was then permitted to testify, based on his first-hand observations, that the location and depth of the wounds on Scot Reinert indicated they were self-inflicted. (N.T. 1/17/92, p. 200-202.).

In light of the formal training of Nurse Gavigan, as well as his extensive practical experience, the trial court did not abuse its discretion in permitting him as an expert.

VII. Commonwealth Witness; Reference to Lehigh County Prison

The defendant also claims the trial court erred in not granting a mistrial after Dr. Isadore Mihalikas, a forensic pathologist, briefly mentioned the fact that the defendant had been incarcerated. It was the only mention of incarceration made at trial and there is no indication that the remark was deliberate and intended on the part of the Commonwealth.

Dr. Mihalikas was asked to identify Commonwealth Exhibit No. 105 and responded, "This is a consultative letter which I sent to you March 29, 1991, after I examined Mr. Reinert at the Lehigh County Prison, in conjunction with ..." (N.T. 1/23/92, p. 40). An objection was made by defense counsel and sustained by the court.

At side bar, the defense moved for a mistrial, which the court denied. The court stated it would give a curative instruction to the jury, if defense counsel wanted one. Defense counsel refused, despite the Court's admonition that "counsel would be waiving any opportunity to ask for a mistrial." (N.T. 1/23/92, p. 42).

A curative instruction would have been an appropriate remedy, however, the defense counsel chose for tactical reasons not to have the court give such an instruction. In refusing the curative instruction, counsel may not now claim prejudice. Commonwealth v. Miller, 333 Pa. Super. 63, 481 A.2d 1221 (1984), (citing Commonwealth vs. Quartman, 253 Pa. Super. 460, 385 A.2d 429 (1978)).

VIII. Defense Counsel's Notes Containing Witness Statements from Pre-Trial Interviews

The defendant alleges the court erred in requiring

defense counsel to turn over counsel's notes made during witness interviews in preparation for trial.

On the sixth day of trial, the Commonwealth presented a motion to the court for the purpose of obtaining certain written notes made by defense counsel during pre-trial interviews with witnesses. After careful consideration and review, the court ordered defense counsel to turn over the notes in question, but limited the discovery to statements made by the witnesses, so as not to include the thoughts or opinions of counsel. The admissibility of the statements was to be determined on a witness by witness basis, with the requirement that the notes be adopted by the witness during the Commonwealth's cross examination of that particular witness. (N.T. 1/24/92, p. 98; 1/27/92, p. 3, 9, 10, 79).

The defendant contends these notes are protected as the work product of the attorney and under the attorney privilege. The defendant therefore asserts that it was improper for the court to order the notes be produced for the prosecution.

An attorney's work product has a qualified privilege against disclosure. Pa.R.Crim.P. 305(G) (definition of work product). The work product privilege does not extend to "information which an attorney secures from a witness while acting for his client in anticipation of litigation." Hickman v. Taylor, 329 U.S. 495, 508, 67 S.Ct. 385, 392 (1947).

In Pennsylvania, it is established caselaw that where the Commonwealth has pretrial statements of witnesses that have been reduced to writing, the Commonwealth must turn these notes over to the defendant's attorney upon request. Commonwealth v. Gartner, 475 Pa. 512, 381 A.2d 114 (1977). This principle was extended to notes in the possession of defense counsel in Commonwealth v. Brinkley, 505 Pa. 442, 480 A.2d 980 (1984).

In Brinkley, the defense attorney possessed pretrial statements of witnesses which the Commonwealth sought to have disclosed. Defense counsel argued that he was not compelled to release them to the Commonwealth because (1) the notes were covered by the work product privilege and (2) they were notes of his own recollection, not

verbatim or substantially verbatim statements. The court granted the motion of the Commonwealth, subject to the limitation that only actual statements from the witness need to be disclosed, not anything else that may appear within the notes.

In light of Brinkley, the trial court did not err in ordering defense counsel to turn over notes from pre-trial interviews with witnesses to the Commonwealth.

IX. Emergency Call

The defendant also contends that a tape of the 911 call made by Charles Ketner should have been admitted and played for the jury. The call was made from the residence of the defendant and the victim after Mr. Ketner arrived at the scene. The defendant argues that these types of calls are admissible and that the tape of the call contains present sense impressions and excited utterances not testified to by the witness during direct and cross examination. There is no need for counsel to argue hearsay exceptions, inasmuch as there is no hearsay problem presented in this instance.

It is true that tapes of emergency calls are now admissible as evidence without the written consent of the speaker. See 18 Pa.S.C. §5717; Commonwealth v. McElhenny, 329 Pa. Super. 240, 478 A.2d 447 (1984).

However, while a piece of evidence may be admissible, whether that evidence is relevant or cumulative is always a concern as well. Here, the witness had testified to making the call and what was said over the phone. The only purpose in playing the tape would have been to convey Mr. Ketner's surprise and anxiety. There is nothing of relevance for the jury to glean from Mr. Ketner's belief and state of mind.

X. Rebuttal Issues

The defendant claims the court erred in permitting the rebuttal testimony of Detective Joseph Stauffer, Ann Marie Orr and Susan Niemkiewicz.

The admission or rejection of rebuttal evidence is within the sound discretion of the trial judge. Commonwealth v. Miller, 490 Pa. 456, 417 A.2d 128 (1980); Commonwealth v. Haddle, 271 Pa. Super. 418, 413 A.2d 735 (1979). Furthermore, the admission on rebuttal of testimony that

could have been offered during the case-in-chief is not reversible error. Commonwealth v. Libonati, 346 Pa. 504, 31 A.2d 95 (1943); Commonwealth v. Eackles, 286 Pa. Super. 146, 428 A.2d 614 (1981).

We first address the claim by the defendant that Detective Stauffer should not have been allowed to testify on rebuttal. During the trial, Mr. Ketner testified that a white handled knife was found at the murder scene. The defendant testified regarding hallucinations that he had after Sean had been stabbed. Detective Stauffer was recalled by the Commonwealth as a rebuttal witness to testify that (1) he did not see a white handled knife at the murder site, nor was a white handled knife mentioned in any witness interviews, (2) that some of what was contained in the defendant's statement to him were direct quotes, and (3) that the defendant made no hallucinatory remarks in his presence.

It was appropriate for the court to permit the detective to be recalled on rebuttal. A primary purpose of rebuttal testimony is to contradict evidence offered by the defendant or his witnesses. Commonwealth v. Hickman, 453 Pa. 427, 309 A.2d 564 (1973). Detective Stauffer testified that contrary to the testimony of the defendant's step-father, Charles Ketner, there was no white-handled knife recovered from the house and that he had not seen one when he conducted a search of the premises. Moreover, Mr. Ketner had not mentioned this knife in any interviews.

In addition to rebutting Mr. Ketner's testimony, Detective Stauffer was permitted to contradict the testimony of several of the defense witnesses, including the defendant, regarding the detective's interview with the defendant. Detective Stauffer explained that the defendant was not forced to give any particular answers during his hospital interview and relayed observations concerning the defendant's clarity and statements that were made. It is also notable that the detective testified that the defendant made no reference during the interview to a bizarre series of events at the home. On direct and during cross-examinaiton at trial, the defendant made reference to hallucinations he had at the house subsequent to the stabbing of the victim.

See N.T. 1/28/92, p. 118-152; N.T. 1/29/92, p. 36-45, 50-65).

The defendant also objects to the rebuttal testimony of Ann Marie Orr, who was a friend and co-worker of the victim. The rebuttal testimony of Ann Marie Orr was admitted by the court because it addressed the victim's frame of mind prior to his death, an issue raised multiple times by the defendant. The defendant claimed that the victim was both depressed and suicidal prior to his death and that the defendant was concerned for Sean's welfare.

Ann Marie Orr observed the actions and attitude of the victim to be in direct contradiction to those testified to by the defendant. Ann Marie Orr testified to the victim's positive attitude and that he was moving on with his life. (N.T. 1/29/92, p. 164).

As a final objection to the rebuttal witnesses offered by the Commonwealth, the defendant alleges the court erred in allowing the testimony of Susan Niemkiewicz. Ms. Niemkiewicz was working as a nurse at the Lehigh Valley Hospital Center on the morning of March 11, 1991, when the defendant was in the Shock Trauma Unit.

During cross examination, the defendant testified that he "never forgot" the strange sequence of events after Sean's death and that he did not recall saying anything to Nurse Neimkiewicz that indicated otherwise. (N.T. 1/29/92, p. 45). The Commonwealth called Ms. Niemkiewicz on rebuttal, and she testified that the defendant had told her on the morning of March 11, 1991, that he did not remember what had happened. Therefore, it was appropriate for the court to permit Susan Niemkiewicz to rebut the defendant's testimony.

XI. Closing Arguments

During closing argument, defense counsel objected to a statement made by the Assistant District Attorney and the objection was overruled by the court. In referring to the deceased victim, the Assistant District Attorney said, "This person has no opportunity to respond to any accusations against him. This person doesn't have the opportunity to come into court before you." (N.T. 1/30/92, p. 81-82). The defendant argues that it was impermissible for the Commonwealth to appeal to the passions of the jury and to

point out that the victim was unable to testify.

A prosecutor is entitled to reasonable latitude in presenting his or her case to the jury and must be free to present arguments with logical force and vigor. Commonwealth v. Smith, 490 Pa. 380, 416 A.2d 986 (1980). Moreover, "Comments by a prosecutor do not constitute reversible error unless the unavoidable effect of such comments would be to prejudice the jury, forming in their minds fixed bias and hostility toward the defendant so that they could not weigh the evidence objectively and render a true verdict." Commonwealth v. Yabor, 557 A.2d 724 (1988). The comments by the prosecutor in this case do not constitute reversible error under this standard.

XII. Jury Instructions

The defendant also contends the court erred in not instructing the jury verbatim on several of the defendant's requested points for charge.

Jury instructions in a criminal case must include an explanation of the principles of law that apply to that particular case. Commonwealth v. Hawkins, 295 Pa. Super. 429, 441 A.2d 1308 (1982). However, a trial judge is not required to accept the language of a requested instruction and is free to select his or her "own form of expression, so long as the issue is adequately, accurately and clearly presented to the jury for its consideration". Commonwealth v. O'Searo, 466 Pa. 224, 352 A.2d 30 (1976); Commonwealth v. Smith, 511 Pa. 343, 513 A.2d 1371 (1986), cert. denied, 480 U.S. 951, 107 S. Ct. 1617 (1986).

While the court in this case did not word the instructions to the jury exactly as the defendant wanted them read, the court gave clear instructions to the jury. the court fully explained reasonable doubt, as is required by case law. Commonwealth v. Young, 456 Pa. 102, 317 A.2d 258 (1974); (N.T. 1/30/92, p. 90-93_. The court also adequately instructed on two other areas contested by defense counsel: expert witness testimony and good character evidence of the defendant. (N.T. 1/30/92, p. 96-97; N.T. 1/30/92, p. 97-98).

The one instruction that the defendant raises in his post-trial motions which was not given to the jury was Standard Jury Instruction 9.508L. This instruction says that

a person is entitled to use less than deadly force to prevent what he believes to be a suicide attempt.

This instruction did not apply to the evidence in the case. Even if the defendant did believe the victim intended to commit suicide, the force that defense counsel argues that he used was "attempting to grab the knife away from Mr. Brady." (N.T. 1/29/92, p. 223). It would have been confusing to the jury to receive an instruction on "less-than-deadly force" in a case where the victim had been stabbed to death. The court was not obliged to instruct the jury that it is permissible to stab someone to death in order to prevent suicide, and the court correctly declined to give such an instruction.

The last argument of the defendant with regard to jury instructions is that the court erred in its instruction concerning the duty to retreat, since that instruction does not apply to this case. The instruction given was:

The defendant must have been free from fault in provoking or continuing the difficulty which led to his use of deadly force and the defendant must have violated no duty to retreat. A defendant is at fault in provoking a difficulty if he is the initial aggressor. As a general rule, a defendant has a duty to retreat before resorting to deadly force and self defense if he knows he can avoid the necessity of using such force with complete safety by retreating.

Taken as a whole and not in selective excerpts (as defense counsel has done), the instruction is correct and pertains directly to the evidence presented in this case.

XIII. Exhibits With the Jury

Specifically, the defendant objects to the following exhibits being sent out with the jury during deliberations: the videotape of the crime scene (Commonwealth exhibit 55), four photographs (Commonwealth exhibits 42-45), the report of EMT Snyder (Commonwealth exhibit 48), hospital records (Commonwealth exhibits 52-54), the report of the anesthesiologist (Commonwealth exhibit 67), the report of Dr. Murphy (Commonwealth exhibit 68), the autopsy report (Commonwealth exhibit 102), a doctor's letter regarding the defendant's wounds (Commonwealth exhibit 105), a medication chart for the defendant during his hospitalization

(Commonwealth exhibit 107), and the report of Nurse Niemkiewicz (Commonwealth Exhibit 115). All of these exhibits had previously been entered into evidence.

Pennsylvania Rule of Criminal Procedure 1114 states "upon retiring for deliberations, a jury shall not be permitted to have a transcript of any trial testimony, nor a copy of any written confession by the defendant, nor a copy of the Information or Indictment. Otherwise, upon retiring, the jury may take with it such exhibits as the trial judge deems proper." None of the above-listed exhibits are excluded by this rule. Furthermore, case law has not rendered any of the exhibits improper per see to go back with the jury. Commonwealth v. Kingsley, 480 Pa. 560, 391 A.2d 1027 (1978); Commonwealth v. Brueckner , 458 Pa. 39, 326 A.2d 403 (1974).

Decisions concerning what exhibits may be permitted to go with the jury into the deliberation room are within the sound discretion of the trial judge and will not be reversed absent an abuse of discretion. Commonwealth v. Lybrand , 272 Pa. Super. 475, 416 A.2d 555 (1979). In this case, there is no basis to find an abuse of discretion and all of the items were properly allowed in with the jury.

For all of these reasons, we deny the post-trial motions of the defendant.

IN THE SUPREME COURT OF PENNSYLVANIA
MIDDLE DISTRICT

COMMONWEALTH OF PENNSYLVANIA, Respondent,	:	No. 286 M.D. Alloc. Dkt. 1996
v.	:	Petition for Allowance of Appeal from the Order and Memorandum Opinion of the Superior Court
SCOT A. REINERT, Petitioner.	:	

ORDER

PER CURIAM

AND NOW this 26th day of September, 1996, the Petition for Allowance of Appeal is DENIED.

TRUE & CORRECT COPY

ATTEST: SEP 27 1996

JOAN L. STEHULAK, ESQUIRE
DEPUTY PROTHONOTARY

IN THE SUPREME COURT OF PENNSYLVANIA
MIDDLE DISTRICT

COMMONWEALTH OF PENNSYLVANIA, Respondent,	: No. 286 M.D. Alloc. : Dkt. 1996
v.	: Application for : Reconsideration of : September 26, 1996 Denial : of Petition for Allowance : of Appeal
SCOT A. REINERT, Petitioner.	:

ORDER

PER CURIAM

AND NOW, this 11th day of December, 1996, the Application for Reconsideration is DENIED.

TRUE & CORRECT COPY

ATTEST: DEC 12 1996

JOAN L. STEHULAK, ESQUIRE
DEPUTY PROTHONOTARY

AFFIDAVIT

DATE: MAY 12, 1995

RE: COMMONWEALTH OF PA VS. SCOT REINERT

I, Lynn Alison Bornfriend, M.D., do hereby swear and affirm to the following information:

Upon receipt of the documentation regarding Mr. Reinert, I have spent several hours reviewing information, including the medical records of his in-patient stay at the Lehigh Valley Medical Center on March 10, 1991 through March 15, 1991, and the transcript of the Suppression hearing #1128/91 dated August 20 and 21, 1991. I have also conducted an initial literature search regarding the controversy around the use of Prozac, as it was viewed back in 1991. There are several areas I would like to address.

The most important issue is whether Mr. Reinert was in good enough shape medically and psychiatrically to knowingly and intelligently waive his Miranda Rights. I think not. The question of his being in hemodynamic shock was initially raised by the EMT who listed this as a diagnosis for Mr. Reinert. Early in his stay in the emergency room, there are several nursing recordings describing him as confused. In addition, there is significant lab evidence of dehydration, blood loss, liver damage and an increased white blood count. These are physical manifestations of shock. Mr. Reinert also had severe knife wounds, including cut wrists and protruding abdominal organs.

A review of Mr. Reinert's described mental status indicates emotional shock. At the time Mr. Reinert was discovered by his parents in his house, he had been in the house with a corpse for two days. In spite of this, he reportedly asked the police officer if "Sean was okay", indicating his confusion. Police officers also reported that he

was unable to recognize what day of the week it was. Despite his first being attended to in the house, his walking to the ambulance and the initiation of treatment in the ambulance, at no time did Mr. Reinert make the EMTs aware of several abdominal wounds, including a wound extruding the small bowel and mesentery. His wounds were discovered incidentally as the paramedics checked his vital signs. Only someone significantly disoriented would be so dissociated from his cognitive processes as to fail to bring these serious wounds to the attention of medical personnel.

Mr. Reinert had made very serious suicide attempts, cutting his wrists bilaterally multiple times prior to being found by his parents. The police report describes the officer finding "blood in nearly every room of the house, a lot of blood". Operating room reports indicate a lot of tendon damage. Information also revealed that Mr. Reinert had fallen down the stairs and injured his ankle and that he consumed a number of sleeping pills and a quantity of red wind (sic.) with the intention of killing himself. The above behaviors reflect an impaired judgement and ability to reason.

Mr. Reinert was in the Operating Room for laparotomy and tendon repair until around 4:00 in the afternoon. During surgery, he was given many anesthetics, including Fentanyl, a synthetic narcotic and Robinal, a sedative and muscle relaxant. Without the above medications, any patient would be in severe pain after such extensive surgery. It was, therefore, clear that the narcotic and sedative and muscle relaxant effects of these medications persisted and remained during the course of Mr. Reinert's being interviewed by the police and that when these medications wore off, Mr. Reinert was in severe pain and required 4 mgs. of morphine. In addition, the fact that a physician told police officers that Mr. Reinert's health would not be threatened by their questioning him does not imply that he was cognitively and mentally clear enough for them to do so.

Mr. Reinert's mother vividly described dissociative,

paranoid and delusional thought patterns, which would severely compromise Mr. Reinert's ability to intelligently waive his Constitutional Rights. She stated, "he said there were all kinds of people running through the house, people sort of like the KKK, "People were chasing me". He also said that, "they marked my house, they hung a flag out front to mark my house". He mentioned something about a body, and I said, "what do you mean body", he said, "you know". Then he said one time there was a body and I looked again and there wasn't a body, so I guess there never really was a body". She also said, "it was like he was there, but he wasn't there. It's a weird way to put it, but you know, like physically he was there and he kind of knew me, but yet like his presence really wasn't there."

Pastor Ronald Keller and Mr. Reinert's best friend, Cindy Mellinger, both testified that he appeared disoriented, medicated and sedated during the time he was in the Shock Trauma Unit. It was during that time that the police took his statement. His ability to state his name and other basic facts does not imply his ability to reason. Even a paranoid schizophrenic maybe oriented to three spheres, but still be unable to cognitively understand and rationally waive Miranda Rights. Any statements made in the ambulance cannot be considered voluntary, because of his medical and psychiatric condition, and the severity of the medical and psychological stressors in this case leads me to believe with a reasonable degree of medical certainty that Mr. Reinert was capable of knowingly and intelligently waiving his Miranda Rights.

I would also like to address the issues concerning the drug Prozac.

Prozac has been the focus of a tremendous amount of controversy in both the medical and lay communities. In March 1990, Newsweek magazine did a cover story describing Prozac as a "wonder drug". The same article, however, quoted Dr. Martin H. Tiecher of Harvard Medical School as stating that he had several patients who had had "intense, violent, suicidal, pre-occupations after 2-7 weeks

of fluoxtine therapy". The Church of Scientology labeled Prozac a "killer drug", stating it drove people to murder and suicide. Various anti-Prozac groups disseminated their message through many press releases, the talk show circuit, and by lobbying Congress and the FDA.

On February 27, 1991, Phil Donahue did a show titled, "Prozac: Medicine That Makes You Kill". Lawyers soon thereafter filed lawsuits against Eli Lily claiming that Prozac had forced people into suicidal or homicidal behaviors. These lawsuits themselves rendered further publicity to the concerns of the lay and medical communities. Lay people became even more distrustful of physicians recommending the use of this medication and this created disputes among family members. This undersigned physician also was faced with these concerns - - my father, an educated architect, upon hearing news commentaries, called to caution me against prescribing this "dangerous drug". It is, therefore, understandable why Mr. Reinert was reluctant and concerned of Mr. Brady's use of the medication. He reports that he had made constant complaints. There were frequent arguments and fights regarding Mr. Brady's continued use of Prozac. This is not unlike other families and many experts could have corroborated the above facts in 1991. It seems to me as a professional that it was necessary in order to completely understand what went on between the two parties and/or the basis of their arguments the night of the incident that information concerning Prozac should have been considered.

Patients being treated with Prozac, like the rest of us, are capable of acting differently in different social settings, and the statement by some of Mr. Brady's friends that he appeared stable psychologically does not negate the possibility of his behaviors being unstable around Mr. Reinert. Prozac is a long-acting medication with an extended half-life. The level of this medication builds up in the blood stream and some people report becoming agitated, aggressive, irritable and even manic after several months of its usage. An observance of such behavior will

lead a lay person to fear its recurrence. In addition, there is a vast quantity of psychiatric literature which explores the phenomenon of patients becoming more actively suicidal during the first several weeks of their treatment with antidepressant medication. This has something to do with the lessening of psychomotor retardation and a motivation. This supports Mr. Reinert's contention that Mr. Brady had been contemplating suicide the night he died. Therefore, Mr. Brady may have been agitated or contemplating suicide the night of the incident.

At the time of the incident and at the time of the Suppression Hearing and at the time of the trial, there were many medical experts easily attainable to testify to the effects of and issues surrounding Prozac as more fully explained below:

A. Prozac was a controversial drug with proponents and detractors in the lay and medical communities,

B. The use and discontinuation of Prozac by family members caused arguments and dissention, and

c. That patients on Prozac might, for varying reasons, become suicidal, aggressive or have affective lability and mood swings.

SIGNED

_____

Lynn Alison Bornfriend, M.D.

Sworn to and Subscribed
before me this 15th day
of May, 1995

SWORN

Florence R. Falance
Notary Public

LYNN ALISON BORNFRIEND, M.D.
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(609) 985-4204

August 22, 1995

Ted Simon, Esq.
1818 Market Street
35th Floor
Philadelphia, PA 19103

RE: SCOT REINERT

Dear Mr. Simon:

Be advised as per my letter of May 12, 1995, I would like to reiterate a few points.

The first issue is the effects of shock and blood loss on a person's ability to understand Miranda warnings. Throughout the medical records that I reviewed, there were multiple references to both emotional shock and physical shock. There is a long list of metabolic findings which indicated presence of several medical problems secondary to Mr. Reinert's wounds and blood loss. In addition, there is a tremendous amount of material which substantiates the facts that Mr. Reinert was dealing with dissociative paranoid and delusional thought patterns, which would severely compromise his ability to waive his Constitutional Rights. Therefore, as stated in my last letter, "the severity of the medical and psychological stressors in this case lead me to believe with a reasonable degree of medical certainty that Mr. Reinert was incapable of knowingly and intelligently waiving his Miranda Rights?. I, as well as others, were available at that time to testify on this issue.

FF

The second issue addressed in that letter involved the use of the psychotropic medication Prozac and the varied responses of patients, as well as the controversy among the professional and lay communities about it's use. This includes the fact that some people, after longer periods of time, can become excessively agitated, aggressive and irritable on Prozac, that some people when initially treated with psychotropic medications become better able to act on suicidal ideation and that there was a lot of controversy around the use of this medication, which often raised dissention among family members. I and other experts could, at that time, have testified to these many issues; and this was not a circumstance where one would have had to hunt for experts.

Should you wish to discuss this matter further, please do not hesitate to call me at (609) 985-4204.

Sincerely,

SIGNED

Lynn Alison Bornfriend, M.D.

ROBERT L. SADOFF, M.D.
Suite 326
The Benjamin Fox Pavilion
Jenkintown, Pennsylvania 19046

Telephone 215-887-6144
Fax 215-887-4477

May 4, 1995

Theodore Simon, Esquire
35th Floor
1818 Market Street
Philadelphia, PA 19103

RE: Scot Reinert

Dear Mr. Simon:

Pursuant to your request, I reviewed a number of records that you provided in the above captioned matter. These include the following:

1. Medical records from the Lehigh Valley Hospital Center in Allentown, Pa, where Scot Reinert was admitted on 3-10-91, with multiple stab wounds of the abdomen and multiple stab wounds bilateral wrists. He was seen then as a 23 year old white male who was brought to the emergency room at that time.

On the nursing assessment record, there is a note that Scot was seen with seven stab wounds around the umbilicus and that mother had called to arrange the hospitalization. she had noted that Scot sounded very confused and complained of foot pain. A psychiatry note on 3-13/91, indicated, "Mr. Reinert seemed better organized, clearer."

On the psychiatric consultation, dated 3-11-91, there is a note, "The patient tells me that he remembers essentially nothing of the events that led to his hospitalization here. He

tells me that the police have informed him that they suspect him of having murdered Shawn. He is quite surprised by this. The patient is very tearful at the loss of Shawn and seems to genuinely miss him. He states that he currently does have suicidal ideation, although he does not have a plan at this time." On mental status examination, he appeared alert, cooperative and quite sad. There is a note, "He seems quite bewildered by what's going on as well as frightened. There are no hallucinations. There do not appear to be delusions present at this time." the diagnosis would be psychogenic amnesia versus malingering and possible reactive psychosis. These were the diagnoses of Dr. Antonowicz, who suggested low dose Haldol in the event of agitation.

Other notes in the hospital records show that Scot was 27 during the hospitalization rather than 23. Discharge summary notes an admission date of 3-10-91 and discharge date of 3-15-91 and again refers to Scot as being 23 years of age rather than 27 as is noted elsewhere in the records.

2. The notes of testimony of the suppression and discovery hearing, dated 8-20 and 8-21-91. During that hearing, the police officers testified that Scot appeared to be in fairly alert, coherent shape, even though he had just been operated on and had some difficulty speaking, except in a very low voice. The doctors also indicated that they had given permission for the police to interview Scot shortly after his major surgery, where he had a general anesthetic. They had cleared him medically for the interrogation.

Also in the hearing was the testimony of Scot's parents, female friend and pastor. They all indicated that Scot appeared confused, was difficult to understand and was not in his usual state of clear thinking of communication.

My understanding of the events that occurred was that Scot had been in some type of altercation with Shawn, his roommate and lover, and that Shawn was stabbed several times. It was also noted that Scott had some wounds that may have been caused during the altercation

as well as wounds that were self-inflicted, both on the wrists and in the abdomen. The altercation apparently occurred about two days before the arrest. During that time, Scot apparently had tried to kill himself by the self-inflicted wounds and also by taking a sleeping medication. His mother testified that she called on the day of the arrest and found that Scot appeared confused and complained of foot pain and was going to the hospital. She drove over with her husband and found Scot sitting in the residence, with obvious cuts on his arms. They had not seen the lacerations or stab wounds of his abdomen. Scot was then taken to the hospital, where the wounds were found and was taken up to surgery, where he had abdominal surgery under general anesthetic. It was shortly after the recovery from the surgery that Scot was interviewed by the police.

It is my understanding that the issue here is whether Scot was competent to waive his Miranda rights and to give a voluntary statement at the time it was given in the hospital shortly after his operations.

In responding to this question, one must consider the totality of events that occurred to Scot at that time. First of all, he had been in an altercation with his lover and had learned that his lover had died. He also had inflicted wounds upon himself in a suicidal or self-destructive fashion, cutting his wrists and his abdomen, requiring abdominal surgery. He was in an emotional state of shock in the sense that he had lost a great quantity of blood as that had been described by the witnesses who were in the house and had seen a lot of blood all over the house. Scot had been given a solution to help with his low blood pressure and his fast heart rate, which are also signs of blood loss and early shock. Scot was then taken to the emergency room and had surgery performed under general anesthesia. One is usually in a fairly confused state of mind following surgery with general anesthesia, and is not thinking as clearly usually, as one does after several days. Scot had just been through a serious altercation with his lover, had lost his lover by death and had been in a state of shock himself following loss of large quantities of blood due

to self-inflicted and other wounds to his wrists and his abdomen. He appeared confused to his mother on the telephone and also when she visited him at his residence shortly thereafter. He also appeared less than clear to his mother, stepfather, pastor and female friend while in the hospital following surgery.

Thus, for all the reasons noted above, it is my opinion, within reasonable medical and psychiatric certainty, that at the time of the taking of the statement of Scot Reinert, he was not at his clearest thinking and was under the influence of the shock of the loss of his lover, the shock of his own wounds and recently emerging from general anesthesia with abdominal surgery that his will and strength and clarity of mind were all impaired. It is more likely than not that at the time he was interrogated by the police and given his Miranda rights, his emotional state was so impaired that he would not have been able to resist effectively the demands of the police at the time or the requests of the police. It would seem that his statement would not be totally voluntary as he may choose, when in a clearer state of mind, to resist giving such a statement, especially under the advice of his attorney, if he had been allowed to see his attorney prior to the interrogation.

The note of Dr. Antonowicz, the psychiatrist who examined him in consultation one day after he was admitted and then three days later, indicated a clearing of his sensorium on the second examination. This implies that his first examination showed Scot to be less than clear, and that was one day after his admission or one day after the interrogation.

It should be noted that medical clearance, i.e., that a person knows where he is, who he is and what time it is, what colors are and who people may be, is not the same as a person being in his full state of clarity of mind for a legal interrogation. They are two separate issues and have two separate degrees of competency. A person who is medically cleared means that he has a stability of his vital signs and can talk to people without undue jeopardy to his

medical condition. However, the degree of mental ability required to effectively resist the interrogation of skilled police officers is much higher than a minimal medical clearance. Scot indicated to Dr. Antonowicz that he had no memory of what happened and seemed surprised that he was being charged in the death of his friend, Shawn. That is clearly a different statement from the one that the police indicate they had taken from Scot earlier, while he was recovering from his surgical procedure. If the police had waited one or two days, until Scot had cleared in his mental sensorium following his emotional ordeals and his surgical procedure, they may have been told the same thing that Scot told to Dr. Antonowicz.

Thus, it is for all these reasons that it is my opinion, within reasonable medical certainty, that at the time of the taking of the statement by the police, Scot Reinert was in such a weakened state of emotional condition following the shock to his system from the death of his lover, the wounds that he had to his own body, the medication that he was under, the loss of blood, the surgical procedure under general anesthesia, that his mental state was not clear enough for him to be competent to waive his Miranda Warnings or to give a truly voluntary statement.

Yours very sincerely,

SIGNED

Robert L. Sadoff, M.D.

RLS:rb

ROBERT L. SADOFF, M.D.
Suite 326
The Benjamin Fox Pavilion
Jenkintown, Pennsylvania 19046

Telephone 215-887-6144
Fax 215-887-4477

August 21, 1995

Theodore Simon, Esquire
35th Floor
1818 Market Street
Philadelphia, PA 19103

RE: Scot Reinert

Dear Mr. Simon:

Please let this letter serve as an addendum to my letter to you, dated May 4, 1995. I have reviewed that letter and stand by the opinions given therein. If I were asked to testify either at a suppression hearing or at trial, I would testify to the opinions that I give in y letter to you of May 4, 1995.

Further, I can add, with respect to the concept of Prozac. It is my understanding that there was an argument between Scot and Shawn about Shawn's use of Prozac. It was my understanding that Scot was concerned about Shawn's use of Prozac as a number of lay people were concerned about others using Prozac several years ago. Prozac has become a very controversial medication - hailed by many as a boon to the depressed and cursed by others as having unusual side effects that may lead to suicide or violent behavior. There have been, to my understanding, a number of legal cases with respect to the effect of Prozac on behavior. It has been reported that patients taking Prozac can have a change of personality as well as a relief of depressive symptoms.

It is my opinion that at the time of the suppression hearing and at the time of trial, there were a number of experts, both on the use of Prozac and on the state of mind when giving a statement, that could have been available to testify if they had been called. We know that Prozac was a controversial drug at that time and that there were reports that the use of Prozac had been related to various changes in behavior, including irritability, aggressiveness, suicidal behavior and, on occasion, violent behavior. People were know to have mood swings and labile affect.

With all of that said, I still hold to the opinions that I gave in my letter, dated May 4, 1995, with respect to Scot Reinert.

Yours very sincerely,

SIGNED

Robert L. Sadoff, M.D.

RLS:ro

STATEMENT

I, Scot Reinert was the defendant in the matter of Commonwealth of Pennsylvania vs. Scot Reinert, in the County of Lehigh. I was charged with First Degree Murder in the death of Sean Brady.

The following are issues concerning problems with pre-trial and trial, that had direct adverse affect on my right to a fair trial.

1. I had requested on more than one occasion and desired of my defense Attorney's Dianne Dickson and Wallace Worth, to obtain expert witnesses for my defense.

Despite the fact that finances were available and constant requests made, my Attorney's failed to provide me with the desired experts.

2. My attorney's at no time informed me of my right to testify at my suppression hearing.

My testimony at that hearing would have supported the fact that certain evidence should not have been presented at my trial.

3. I discussed with my Attorney's that I would like a Medical Expert Witness, to testify at my suppression hearing.

The testimony of that witness would have supported the fact of the circumstances that due to: Severe blood loss, many wounds, shock of the incident, the amount of sleeping pills in my system, surgery and the shock attributed to surgery and more medication (morphine) administered in the hospital; that I was in no condition for police interrogation and certainly unable to understand, let alone waive my Miranda Rights.

It was also desired and asked of my attorney's to provide this Medical Expert Witness at trial to testify to my

condition at the time of my supposed reading of my Miranda Rights by the Allentown Police.

It is my belief then and now that testimony given by a Medical Expert would have supported my testimony, as well as others who testified for me, regarding my condition at the time of admittance to the hospital and my condition pre and post surgery.

4. The issue of Prozac was the antagonist between myself and Sean Brady during the last months and evening of the incident.

Due to our long friendship and living arrangement, we were both aware of the other's behavior and character. It was shortly after psychological medication was dispensed to Sean Brady, that I noticed a drastic change in his behavior and personality. At first I was not aware that he was taking the controversial drug Prozac. Though I had heard of the drug and read about it's side affects.

My concern deepened when my long time friend Sean, progressively became moody, violent in speech and nature, and at times suicidal. Expressing my concerns to him only made matters worse. I had become a first hand expert to the down side of Prozac.

During that time and since I have read many articles, watched many talk shows and talked to several people who have had negative side affects to the use of Prozac.

Sean was obsessed with Prozac, which led to a discussion I had with his doctor, who dispensed the drug to him like it was candy.

Sean Brady's behavior due to Prozac led to arguments between concerned friends and eventually to a terrible loss of one of them.

This issue should have been allowed to be heard during my trial by means of an expert witness as was

directed by the court. As the least I should have been able to express the facts of the case without being forced to suppress the most significant part of it.

Had my attorney's provided an expert witness to testify about the affects of Prozac, as they were asked to by me and told by the court. That testimony would have supported my own testimony regarding the severe psychological changes in Sean Brady. brought on by his use of the drug Prozac.

SIGNED

_____

SCOT REINERT

WITNESSED AND NOTARIZED BY:

SIGNED

_____

MARK CEMBROCK

THIS 11TH DAY OF MAY, 1996

AFFIDVAIT

Commonwealth of Pennsylvania :
:
: SS: Scot Reinert
:
County of Luzerne :

BEFORE ME, the undersigned authority, personally appeared SCOT REINERT, who being duly sworn according to law, deposes and says that he is the maker of the foregoing statement, and that the facts set forth therein are true and correct to the best of his knowledge, information and belief.

SIGNED
s/_____
AFFIANT

SWORN AND SUBSCRIBED TO,

BEFORE ME THIS 11TH DAY OF

MAY, 1995
SIGNED

_____
MARK CEMBROCK
NOTARY PUBLIC

AFFIDAVIT

I, Janet A. Ketner, of the address 1117 Schuylkill Mountain Road, Schuylkill Haven, Pa. 17972, mother of Scot Alan Reinert, who was convicted of first degree murder in the death of Sean Brady in the Lehigh County Courts, do attest and affirm the following:

1. On March 10, 1991 at 12:00 my husband Charles F. Ketner and I found Scot in his home at 120 N. West St. Allentown, Pa, in an injured and confused condition. Charles called 911 Scot was transported to the Lehigh Valley Hospital by ambulance. Charles, Cindy Mellinger, a friend of Scot's, and I were detained at Scot's house until about 4:00 P.M. by Detective Stauffer of the Allentown Police Department. We were not allowed to leave, use the bathroom facilities or telephone during this time.

2. We arrived at the hospital around 5:00 P.M. Initially hospital staff told us they weren't quite finished with Scot and they would come get us when they were finished. Soon after that, an Allentown police officer who was guarding Scot, told us we were not allowed to see Scot until Detective Stauffer talked to him. About 8:00 P.M., Charles, Pastor Keller, Cindy and I were allowed to visit Scot, with Attorney Wallace Worth and Attorney Dianne Dickson arriving about fifteen minutes later. We all observed Scot's weakened and disoriented condition at that time.. I later became aware that Mr. Worth stated that he could testify to Scot's condition, and that he felt that he was in no condition to give a statement, but to do this he would have to disqualify himself as Scot's Counsel. Attorney Worth did not follow through with this either.

3. Mr. Worth and Miss Dickson discussed the use of expert witnesses as to Scot's condition but never pursued that either. We had also informed Mr. Wallace and Miss Dickson of the name of a friend of Scot's, who knew a person in New York that could testify on the Prozac issue, but they didn't follow through with this either.

SIGNED

JANET A. KETNER

SWORN and SUBSCRIBED to
before me this 15th day
of May, A.D., 1995.

SIGNED
JANET M. GERST

AFFIDAVIT

I, Charles F. Ketner, of the address 1117 Schuylkill Mountain Road, Schuylkill Haven, Pa. 17972, stepfather of Scot Alan Reinert, who was convicted of first degree murder in the death of Sean Brady in the Lehigh County Courts, do attest and affirm the following:

1. Scot's mother, Janet A. Ketner and I found Scot in an injured and confused condition, at his home at 120 N. West St. Allentown, Pa, on March 10, 1991, at approximately 12:00 P.M. Shortly thereafter I called 911. They removed Scot by ambulance. We were detained at the house by Detective Stauffer of the Allentown Police Department, until about 4:00 P.M., without the use of bathroom facilities or the telephone, during this time.

2. We arrived at the Lehigh Valley Hospital at approximately 5:00 P.M. We were denied access to Scot at that time by an Allentown police officer, who was guarding Scot, who said we could not see him until Det. Stauffer got there. At approximately 8:00 P.M. we, Janet, Pastor Keller, Cindy Mellinger and I were allowed to see Scot who was extremely weak and disoriented. Several minutes later Attorney Wallace Worth and his associate Attorney Dianne Dickson arrived. Both Mr. Worth and Miss Dickson observed Scot's disorientation, and weakened condition. At some future time Mr. Worth stated that he could testify to Scot's condition, and disqualify himself as Scot's Counsel. Attorney Worth did not follow through with this course of action.

3. Mr. Worth and Miss Dickson, Mr. Worth's associate, had discussed the use of expert witnesses as to Scot's condition. We also conveyed the name of a friend of Scot's, who knew of a person in New York who could testify on the Prozac issue, to r. Worth and Miss Dickson. They did not follow through with this either.

SIGNED

CHARLES F. KETNER

SWORN and SUBSCRIBED to
before me this 15th day
of May, A.D., 1995.

SIGNED
JANET M. GERST

Commonwealth of Pennsylvania	:	
	:	No. 4349
	:	PHL 1994
vs.	:	Trial Docket No.
	:	1128 of 1991
	:	
Scot A. Reinert,	:	

AFFIDAVIT

I, Dianne M. Dickson, Esq., was primary trial counsel for the defendant, Scot A. Reinert, in the above captioned matter, in the County of Lehigh. Mr. Reinert was convicted for First Degree Murder.

1. My best recollection is that I did not inform Mr. Reinert of his right to testify at the Suppression Hearing.

2. I candidly must state that I did not call an expert medical or psychiatric witness at either the Suppression Hearing or trial to testify concerning Mr. Reinert's grave medical and psychological state, and there was no strategic basis for such failure.

3. Although I was provided with a resource to obtain an expert witness for trial regarding Prozac, I unfortunately did not follow through with that information, and no expert witness was called at trial. There was no strategic basis for such failure.

4. It is true that I visited Scot Reinert at the hospital the evening of Sunday, March 10, 1991, and I arrived immediately after the detectives finished taking Mr. Reinert's statement. I witnessed Mr. Reinert's condition at that time, and in my view he was completely "out of it"; he was not coherent, was in a great deal of pain, was not in a condition to make a statement, was not competent to make a statement, nor was he capable of understanding or knowingly and intelligently waiving his Miranda rights.

5. After being asked why I did not testify at either the Suppression Hearing or at trial concerning Mr. Reinert's condition on the evening he made the statements to the detectives, I can only say that I did not think to do so, and there was no strategic basis for such failure. In addition there is no strategic basis for not calling Officer Mertz at suppression, or renewing the Motion to Suppress at trial given his testimony, and, unfortunately, I failed to do so.

6. As to 1-5 above, I recognize that I erred with regard to these failures and Mr. Reinert and his case adversely suffered as a result.

SIGNED

_____

DIANNE M. DICKSON, ESQ.

WITNESSED AND NOTARIZED BY:

SIGNED

_____

CARRIE M. McNAIR

this 27th day of October, 1995.

Supreme Court, U.S.
FILED
JUN 12 1997
OFFICE OF THE CLERK

(3)

No. 96-1809

In The
Supreme Court of the United States

October Term, 1996

SCOT A. REINERT,

Petitioner

v.

COMMONWEALTH OF PENNSYLVANIA

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPERIOR COURT OF PENNSYLVANIA

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Douglas G. Reichley
Counsel of Record
Deputy District Attorney
P.O. Box 1548
Allentown, Pa. 18105
(610)820-3100
Attorney for Respondent

34 pp

COUNTER-STATEMENT OF THE QUESTIONS PRESENTED

1. Did the Suppression Court rule correctly in denying the petitioner's request to suppress evidence seized by law enforcement officers from the defendant's home during a warrantless search, where the initial entry into the home was made on the basis of exigent circumstances, items seized were observed in plain view, and the items would have been admissible under an inevitable discovery rule?

2. Did the Suppression Court rule correctly in denying the petitioner's motion to suppress statements made by the defendant on March 10, 1991, which occurred after the defendant was provided with his *Miranda* rights on two occasions, and his waiver of rights was knowing, intelligent and voluntary?

3. Was petitioner denied his Fifth and Sixth Amendment rights to effective assistance of trial counsel where supposed expert witnesses who would testify to the petitioner's physical and mental condition regarding his waiver of *Miranda* rights and the effects of Prozac did not exist at the time of trial, where trial counsel correctly refrained from having petitioner testify at a suppression hearing where such testimony could have been used to impeach petitioner at trial, and where counsel's testimony regarding petitioner's condition at the time he gave his statement would have been cumulative of other witnesses who testified to the same information?

4. Did the Trial Court rule correctly in precluding the introduction of any lay testimony concerning the victim's use of Prozac where there was an insufficient foundation to allow the introduction of such testimony in relation to the victim's conduct, and where such use of Prozac did not bear upon the defendant's culpability?

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COUNTER-STATEMENT OF THE CASE

On March 10, 1991, officers of the Allentown Police Department were called to the blood-stained row home where Scot Reinert stabbed his former lover to death. Officers observed blood streaked on walls and puddling on floors throughout the house. Reinert would subsequently inform police that he plunged a large butcher knife into Sean Brady's upper torso six times and to a depth of seven inches. (N.T. Vol. IV, 16-26)[1] Four of the wounds were fatal. (N.T. Vol. IV, 24) The wounds inflicted on the victim's body were consistent with the size and dimension of the blade of the knife seen in plain view in the second floor bathroom by police officers as they inspected the home for other victims and to preserve essential evidence. (N.T. Vol. IV, 28) Officer Jeffrey Mertz of the Allentown Police Department responded to 120 N. West St. in Allentown, Lehigh County, Pennsylvania, upon a call to assist an ambulance with a person who slashed his wrists and the report of a body in the house. (N.T. Vol. I, 23-24) Upon Officer Mertz' arrival at the residence at 12:11 p.m., he was directed inside the home and to the third floor by the defendant's step-father. (N.T. Vol. I, 25) As Officer Mertz entered the home, he noticed the defendant seated on the living room floor with what appeared to be dried blood on each of his wrists. (N.T. Vol. I, 26) Officer Mertz did not see the defendant's mother in the house as he entered, but did later learn she was in the house. (N.T. Vol. I, 27-28)

Upon Officer Mertz' arrival on the third floor, he discovered a body wrapped in bedsheets with only the legs exposed. (N.T. Vol. I, 27) This body was later identified as that of Sean Brady. (N.T. Vol. I, 34) Officer Mertz remained on the third floor until the body was removed from the house. (N.T. Vol. I, 34)

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[1] "N.T." refers to trial notes of testimony, January 17-30, 1992. "S.N.T." refers to notes of testimony from the Suppression Hearing, held August 20-21, 1991.

Soon after police officers arrived at the house, they were followed by members of the Allentown Emergency Medical Services Squad. EMS Technician Timothy Snyder entered the home and initiated treatment of the defendant. (N.T. Vol. I, 53) During the time of his treatment, the defendant was awake and his wounds were not actively bleeding. (N.T. Vol. I, 53) Mr. Snyder did a routine evaluation of the defendant which consisted of asking him if he knew where he was, what was going on, and what had happened. Based upon the defendant's responses to these questions, Snyder judged him to be mentally coherent at the time. (N.T. Vol. I, 54) In fact, on each of four criteria, Snyder found the defendant possessed the highest level of coherence and mental clarity possible. (N.T. Vol. I, 56-58) The defendant was eventually removed from the house and taken to an ambulance waiting outside. While treating Reinert in the ambulance, Snyder discovered an open abdominal wound on the defendant. When he asked the defendant what had happened, Reinert responded, "I stabbed him with a butcher knife, then I did myself." (N.T. Vol. I, 62) Although the defendant was wearing an oxygen mask to assist in his treatment at the time, EMS Snyder did not have any difficulty in understanding the defendant, nor were Reinert's words slurred or garbled. (N.T. Vol. I, 63)

Upon hearing the defendant's initial admission to the stabbing, EMS Technician Snyder alerted Officer Zimmerman of the Allentown Police Department that he may want to step into the ambulance. Importantly though, Snyder did not tell Zimmerman what Reinert had just said. (N.T. Vol. I, 62-63) Officer Zimmerman, who was accompanied by Officer Robert Lembach, asked the defendant a series of questions which included his name, his date of birth and what happened. At this time, the defendant was not in custody nor was he a suspect in a crime. The police officers had the limited knowledge that a body was found inside the house and that Reinert appeared to be wounded. Reinert was able to tell Officer Zimmerman his

name, his age and his home telephone number. (N.T. Vol. I, 143) When Zimmerman, without knowledge of Reinert's previous statement to EMS Technician Snyder, asked the defendant what had happened, Reinert replied, "I stabbed him. I think I killed him." (N.T. Vol. I, 143)

Following this response, Officer Zimmerman immediately stopped the defendant from saying anything else. Zimmerman took out a *Miranda* card and advised the defendant of his rights. (N.T. Vol. I, 143) When Zimmerman advised the defendant of his *Miranda* rights, the defendant stated that he understood his rights. When Zimmerman asked the defendant if he was willing to speak with him at this time, Reinert responded affirmatively. (N.T. Vol. I, 144) Zimmerman then asked whom Reinert stabbed, and the defendant answered, "Sean. Sean Brady." The defendant identified the victim as the corpse found within the house. Zimmerman asked how the killing was committed and Reinert informed him, "With a butcher knife." (N.T. Vol. I, 145) Despite the use of an oxygen mask by the defendant, Officer Zimmerman testified he did not have any difficulty in understanding what the defendant said. (N.T. Vol. I, 145)

Before the arrival of Detectives Stauffer and Granitz at the home at approximately 12:45 p.m., the police had not conducted a thorough inspection of the residence. Officer Mertz went immediately to the third floor to verify the location of the body. (N.T. Vol. I, 37) Officer Lembach never proceeded past the second floor (N.T. Vol. I, 31) and Officer Zimmerman only glanced in rooms on the second floor as he went up to the third floor to confer with Officer Mertz. (N.T. Vol. I, 157) Although a thorough search of the home was a high priority, the detectives were also faced with the need to expedite a determination by the coroner of the time of death of Brady. Such an investigation required an alteration of the condition of the corpse. This entailed the coroner performing an incision to conduct a liver probe to obtain a body temperature. (N.T. Vol. I, 139; Vol. IV,

28) The victim was wrapped in blankets that obscured the nature of any injuries to his body. When Sgt. Thomas Moyer arrived at 1:00 p.m., he took photographs of the scene on the third floor bedroom where the victim's body was located to preserve a depiction of the crime scene as the victim's body was found. Following this procedure, Moyer joined Stauffer for a brief protective serach, during which the murder weapon was observed in plain view on the floor of the second floor bathroom. (S.N.T. 8/20/91, 28) Contrary to petitioner's assertions, the police did not conduct a five-hour photographic or video tape memorialization of the interior of the defendant and victim's house. Instead, Sgt. Moyer completed his photographic duties within two hours from his arrival. (N.T. S.N.T., 8/20/91, 182)

At the time when the officers entered the home, the defendant's mother and step-father were present. Det. Granitz received information from the defendant's mother, Janet Ketner, which was confusing and contradictory. (S.N.T. 8/20/91, 186) Mrs. Ketner testified that when she called her son at approximately 11:30 A.M. on March 10, 1991, he mentioned something about a body. When questioned further about this statement, Mrs. Ketner related the defendant said, "One time there was a body, and I looked again and there wasn't a body, so I guess there never really was a body." (S.N.T. 8/21/91, 28) When Mrs. Ketner asked the defendant about his roommate, Sean Brady, Reinert responded, "I think some of his friends are in town, and I think he went out with them for the day." (S.N.T. 8/21/91, 28) When she arrived at the house, Mrs. Ketner went straight to the third floor and did not go through every room. (S.N.T. 8/21/91, 40) Mrs. Ketner informed the police what her son told her about a body being in the house and then disappearing, and that she found one body. However, she never informed the police she made anything resembling a thorough inspection of the home. (S.N.T. 8/21/91, 41)

As a result of this contradictory information, the police undertook a search of the entire house to determine if there was anyone else present who may have been injured or killed, or who may endanger the preservation of any evidence. As Det. Stauffer and Sgt. Moyer went through the house, Sgt. Moyer observed a butcher knife laying on the floor in the bathroom of the second floor. (S.N.T. 8/20/91, 128) This walk-through by Stauffer and Moyer commenced at approximately 1:30 p.m. and took twelve to sixteen minutes. (N.T. Vol. II, 68-69) Sgt. Moyer observed through an open doorway what appeared to be a butcher knife laying on the top of a weight scale in the corner of the bathroom. (S.N.T. 8/20/91, 179) Moyer and Stauffer were going through the house at the time to "try to determine if there were in fact any other people in the house and we did not find anyone." (S.N.T. 8/20/91, 128) The knife was not covered or in any cabinet, but was laying out in the open and in plain view. (S.N.T. 8/20/91, 129)

After the discovery of the knife, Detectives Stauffer and Granitz began the acquisition of various items of blood-stained evidence, all of which were out in the open in plain view. Although some drawers and closets were opened, the police did not obtain <u>any</u> item on March 10, 1991 which was taken from any closed container or a closed drawer. (S.N.T. 8/21/91, 25) Some items were removed from an open medicine chest, an open closet, and a garbage can which did not have a lid. All items that were taken from those specific locations were in plain view at the time of their observation. (S.N.T. 8/21/91, 25)

The defendant was transported from the residence at 120 N. West Street to the Lehigh Valley Hospital Center where he underwent surgery for the wounds upon his wrists and his abdomen. The emergency room nurse, Thomas Gavigan, was requested by Officer Zimmerman to note any statements the defendant made prior to surgery. (S.N.T. 8/20/91, 78) Within his notes, Nurse Gavigan wrote that Mr. Reinert said he was "fighting with his friend with a knife, they had fallen off the bed

and that he, the friend, might have done this." Reinert also stated he might have done this to himself. Reinert concluded by claiming that he had fallen down several stairs. (S.N.T. 8/20/91, 79) Nurse Gavigan believed Mr. Reinert was coherent at the time when he made these statements. Gavigan also testified that Reinert was not given any medication which would have affected his mental clarity. (S.N.T. 8/20/91, 80) The defendant's wounds were not actively bleeding at the time of treatment in the emergency room. (S.N.T. 8/20/91, 85) The defendant was able to provide information about the date of his last tetanus shot, that he was not on any medication, and that he lacked any significant prior medical history. (S.N.T. 8/20/91, 100) Once again, contrary to the petitioner's assertions, Nurse Gavigan was not instructed by Officer Zimmerman to write down any information with the specific purpose of providing the officer with a record of statements uttered by Reinert. Instead, Gavigan was asked to merely note any statements made by Reinert for subsequent review. (S.N.T. 8/20/91, 78)

Emergency Room Nurse Patricia Lombardo conducted an evaluation of Reinert to determine the necessity of 24-hour nursing observation. In the course of her questions, Lombardo asked Reinert if he intended to harm himself. Reinert responded by indicating that some of the wounds he sustained were self-inflicted. (S.N.T. 8/20/91, 98) Lombardo noted that Reinert's blood pressure was stable and that his pulse was satisfactory. (S.N.T. 8/20/91, 101) In addition, Nurse Lombardo calculated the level of consciousness exhibited by Reinert based upon a scale described in a procedure called the Glasgow Coma Test. The patient's level of consciousness is recorded on a number of different scales and then totaled to calculate a score indicating a level of consciousness during treatment. (S.N.T. 8/20/21, 101-102) Based upon the fact that Reinert's eyes opened spontaneously, his verbal responses were oriented to time, place, person and situation, he was able to follow directions, he obeyed commands, and was able to inform the nurse of his medical injuries, Reinert received the highest possible score on the

Glasgow Coma Test. This meant his level of consciousness was alert and oriented. (S.N.T. 8/20/91, 105) This evaluation was made at 12:42 p.m., approximately 31 minutes after the time of the original police call. (S.N.T. 8/20/91, 107) Based upon all these factors, Nurse Lombardo held the opinion that Reinert was alert and coherent during the entire time of the evaluation by the nurses. (S.N.T. 8/20/91, 109)

Upon Mr. Reinert's arrival in the operating room, he was judged to be in very stable condition. (N.T. Vol. III, 13) His injuries were classified as "minor wounds" by one doctor. (N.T. Vol. III, 14) During the course of the operation, Mr. Reinert lost less than one-half pint of blood (N.T. Vol. III, 16), and received his last intravenous medication at 1:30 p.m. (N.T. Vol. III, 17) Reinert was administered a very mild anesthetic of the type that would be given to an out-patient with the thought of having the patient well enough to go home later that same day. (N.T. Vol. III, 34) Prior to surgery, the defendant was able to tell the anesthetist that he was alergic to penicillin, codeine and sulphur. (N.T. Vol. III, 25)

Following surgery, the defendant was under the supervision of Dr. Homeiu Hashemi, who participated in the surgery upon the defendant's abdomen wound. Dr. Hashemi's review of the records indicated that there were no sedatives administered to the defendant immediately following surgery. (N.T. Vol. IV, 142) At 7:30 p.m. on March 10, 1991, Dr. Hashemi checked the defendant and found that he was awake, that his vital signs were stable, and that he was stable post-operatively. (N.T. Vol. IV, 143) Following the surgical procedure, the only medications that defendant received were an antibiotic, an antacid, and one dosage of morphine at 10:00 o'clock p.m. (N.T. Vol. IV, 147)

At approximately 7:47 p.m. on March 10, 1991, Detectives Stauffer and Granitz arrived at the Lehigh Valley Hospital Center. After conferring with Dr. Hashemi, they were

told they could speak with the defendant. (N.T. Vol. II, 106) The detectives asked the defendant a few preliminary questions to determine if Reinert was conscious and oriented. (S.N.T. 8/20/91, 136) The defendant was able to answer questions about his name, his social security number, and his date of birth. The defendant was also advised of his *Miranda* rights a second time and indicated to the detectives that he understood his rights. Reinert agreed to waive his rights and speak with the detectives. (S.N.T. 8/20/91, 136-137) At this time, the defendant gave his statement to both detectives that he lived at the residence on N. West Street with Sean Brady. The previous Friday evening, they were coming back from New York City and got into an argument over Brady's plan to leave Reinert and move to Brooklyn. Shortly after they returned, Brady went up to the third floor bedroom. The defendant stayed downstairs, but at some point, he obtained a butcher knife from the kitchen. Reinert's original plan was to cut his wrists, but instead, he went upstairs and found Brady alone in bed in the third floor. The defendant related as he leaned over the victim, Brady opened his eyes and the defendant stabbed him. There was a struggle because Brady "wouldn't let me stab him." The defendant was not sure how many times he stabbed Brady, but it was more than once. (S.N.T. 8/20/91, 138; N.T. Vol. II, 111-112) Reinert told police the knife he used in the stabbing could be found in the bathroom on the second floor of the house. (N.T. Vol. II, 112) When asked why he stabbed Brady, Reinert admitted he was mad about Brady's proposed move out of Allentown. (N.T. Vol. IV, 114)

Following the stabbing, Reinert attempted suicide by slashing his wrists, stabbing himself in the stomach and by overdosing on sleeping pills he bought from a CVS drugstore on March 9, 1991. (N.T. Vol. IV, 115) Reinert was able to recall for the detectives he cut himself before stabbing his former lover and then attempted to slash his wrists with razor blades. (N.T. Vol. IV, 115-116) At no time during the conversation with the detectives did the defendant become incoherent, nor did his

answers seem to be illogical responses to any of the questions posed to him. (S.N.T. 8/20/91, 139-140) The entire conversation lasted approximately 45 minutes. (S.N.T. 8/20/91, 142)

SUMMARY OF REASONS FOR DENYING THE WRIT

"It is well-established that under certain circumstances the police may seize evidence in plain view without a warrant." *Coolidge v. New Hampshire*, 403 U.S. 443, 91 S.Ct. 2022, 29 L.Ed.2d 564 (1971). Those circumstances include situations, "where the initial intrusion that brings the police within plain view of such [evidence] is supported...by one of the recognized exceptions to the warrant requirement," such as the exigent circumstances intrusion. *Arizona v. Hicks*, 480 U.S. 321, 107 S.Ct. 1149, 94 L.Ed.2d 347 (1987). In this particular case, police entered the defendant's home upon the report of a dead body and another person with severe injuries. In the course of doing a protective search to shield the officers and other persons from any assailant within the home or to prevent the destruction of evidence, members of the Allentown Police Department observed the murder weapon in plain view through an open doorway during a 12 to 16-minute cursory search of the home. Even if this Court should find that the items taken by the police were not observed in plain view by officers who had a valid reason for being in a particular location to observe the items, such evidence is sufficiently purged of any taint from unlawful police activity due to the inevitable discovery of the same items. The statement provided by the defendant to the detectives later that same day in the hospital serves as an independent basis for the police to obtain a warrant in which the same items seized by the police would have eventually been taken into custody through the execution of a search warrant. To prohibit the introduction of such items of evidence would add nothing to either the integrity or the fairness of a criminal trial. *Nix v. Williams*, 467 U.S. 431, 104 S.Ct. 2501, 81 L.Ed.2d 377 (1984).

Statements were obtained from the defendant by medical personnel in the ambulance and also at the hospital emergency room. At the time these inculpatory statements were given, the defendant was not in police custody, the defendant was in stable medical condition and was alert and oriented to his surroundings. Any statements provided to the police were preceded by the administration of *Miranda* warnings which the defendant indicated he understood and waived. The defendant never displayed any delusional or halucinatory symptoms which would mitigate against a finding that the waiver of the *Miranda* warnings was anything other than a voluntary, intelligent and knowing decision.

The defendant has cited four basic allegations of ineffectiveness against trial counsel. Trial counsel cannot be held to be ineffective for failure to obtain expert witnesses to testify on matters for which there was no reasonable, scientific basis for their opinion, or if such witnesses did not exist. Affidavits which have been submitted some six years after the fact cannot be considered in any evaluation of trial counsel's effectiveness due to the inability of petitioner to legitimately claim these witnesses were available at the time of trial. The other allegations of ineffectiveness regarding trial counsel's failure to testify regarding the petitioner's condition when he gave his statement to the police and trial counsel's failure to advise the defendant to testify at a suppression hearing, are not the type of omission that would have affected the outcome of the trial.

Lastly, the Trial Court was correct in precluding any introduction of lay testimony concerning the victim's use of the drug Prozac based upon the insufficient foundation for such testimony and the lack of relation between the victim's use of Prozac and the petitioner's contention of self-defense. Neither the allegations of ineffectiveness nor the preclusion of testimony about Prozac were based on federal constitutional claims in the lower courts.

ARGUMENT FOR DENYING THE PETITION

A. The lower court ruled correctly in denying the petitioner's request to suppress evidence seized by law enforcement officers from the defendant's home during a warrantless search where the initial entry into the home was made on the basis of exigent circumstances, items seized were observed in plain view, and the items would have been admissible under an inevitable discovery rule.

When the police come upon the scene of a homicide, they may make a prompt, warrantless search of the area to see if there are other victims or if a killer is still on the premises. Furthermore, the police may seize any evidence that is in plain view during the course of their legitimate emergency activities. *Mincey v. Arizona*, 437 U.S. 385, 98 S.Ct. 2408, 57 L.Ed.2d 290 (1978). "The need to protect or preserve life or avoid serious injury is justification for what would be otherwise illegal absent an exigency or emergency." *Wayne v. United States*, 115 U.S. app. D.C. 234, 241, 318 F.2d 205, 212 (1963) as quoted in *Mincey v. Arizona, supra*, 437 U.S. at 393, 98 S.Ct. at 2413. In addition, unlawfully obtained evidence is nevertheless admissible if it can be established that ultimately or inevitably the same evidence would have been discovered by lawful means. *Nix v. Williams*, 467 U.S. 431, 104 S.Ct. 2501, 81 L.Ed.2d 377 (1984).

"It is well established that under certain circumstances the police may seize evidence in plain view without a warrant." *Coolidge v. New Hampshire*, 403 U.S. 443, 465, 91 S.Ct. 2022, 2037, 29 L.Ed.2d 564 (1971) Those circumstances include situations, "where the initial intrusion that brings the police within plain view of such [evidence] is supported...by one of the recognized exceptions to the warrant requirement," such as the exigent circumstances intrusion. *Arizona v. Hicks*, 480 U.S. 321,

107 S.Ct. 1149, 94 L.Ed.2d 347 (1987). Contrary to the petitioner's assertions, there was never any extensive protective search conducted of the entire house before Det. Stauffer began going through the home with Sgt. Thomas Moyer. Contrary to petitioner's allegations within the Petition for Writ of Certiorari, there cannot be found any reference in any portion of the testimony that Officer Mertz looked in rooms on the second floor, including a bathroom, a middle room and Mr. Reinert's bedroom. Instead, Officer Mertz testified that he went only to the third floor. Officer Zimmerman, who arrived after Mertz, testified that he did not search any rooms as he proceeded up to the third floor to speak with Mertz. When Zimmerman returned downstairs, the Allentown EMS Squad, Officer Robert Lembach and Officer Bryan Brader had arrived on the scene. Lembach went to the back door and stationed Brader there. Lembach then went up to the second floor stairway where he spoke with Mertz. However, Lembach did not go into any rooms on the second floor and did not ever go up toward the third floor. (N.T. Vol. I, 131) As a result, the testimony indicates that not a single officer entered any of the rooms on the second floor before Stauffer and Moyer. Following the memorialization of the condition of the victim's body and its location, Moyer and Stauffer commenced their protective search. (N.T. Vol. II; 68-69) It was during this 12 to 16-minute protective search that Moyer discovered the butcher knife in plain view in the second floor bathroom. (S.N.T. 8/20/91, 179) The knife was not covered or in a cabinet, but was laying out in the open and in plain view. (S.N.T. 8/20/91, 129)

The Pennsylvania Superior Court wrote in its Opinion that the judge who presided over the Suppression Hearing and trial, the Honorable Carol K. McGinley, comprehensively discussed and adequately disposed of questions presented regarding the suppression of evidence and statements. Judge McGinley found that the police officers were lawfully on the scene when the evidence was observed in plain view. The knife was discovered unintentionally. The Pennsylvania Supreme

Court affirmed the reasoning and analysis of the Superior Court and Judge McGinley by denying the petitioner's Petition for Allowance of Appeal to the Pennsylvania Supreme Court. Contrary to the petitioner's assertion, the police did not conduct an initial protective sweep of the home before the detectives and Sgt. Moyer arrived. Instead, because the coroner needed to make a deep liver probe insertion into the body to determine the length of time the victim was dead, the initial protective search did not commence until the coroner's procedure was concluded. This procedure required the victim's body to be unwrapped from the bedsheet surrounding the body at the time. Because of the concern to accurately assess the length of time the victim was dead, it was necessary to make a photographic record of the victim's position and condition before he was moved and his original position altered. After this procedure was completed, Stauffer and Moyer then conducted their protective search of the home during which time the butcher knife was found in plain view in the bathroom.

All items which the police seized from the house were out in the open or in plain view. These included numerous items from the victim's bedroom, clothing, towels, a robe, switchplate covers, clothing from the bathroom on the second floor, and items which could be viewed from the hallway or which were located in the bedroom which the defendant was using at the time on the second floor. Some items also came from the kitchen and the first floor living room. (S.N.T. 8/21/91, 22) Det. Granitz testified under questioning from the Court during the Suppression Hearing that there were several items, "which were found in open containers, such as the medicine chest and the closet which were open." (S.N.T. 8/21/91, 25) A note taken from a garbage can was observed because the can did not have a lid upon it. The garbage can in the kitchen was not searched until a search warrant was obtained at a later time. (S.N.T. 8/21/91, 25-26)

Although the petitioner expresses great outrage that a magazine with a title upon it referring to homosexuals was taken into custody, Det. Granitz explained at the Suppression Hearing that the magazine was seen when the mattress of the victim's bed was lifted to enable the police to remove blood-stained sheeting. The sheeting was in plain view and blood-stained to such an extent to make it an obvious item of material evidence. When the mattress was lifted to remove the sheets, the magazine was observed. (S.N.T. 8/21/91, 24) More importantly though, the magazine was never introduced at trial. Therefore, the defendant did not suffer any prejudice from this particular item being retrieved by the police.

Petitioner argues that the decisions by the United States Supreme Court in *Mincey v. Arizona*, *supra*, and *Thompson v. Louisiana*, 469 U.S. 17, 105 S.Ct. 409, 83 L.Ed.2d 246 (1984) should prompt a reversal of the decision by the Suppression Court, the Superior Court and the Supreme Court of Pennsylvania. However, upon closer examination, there are sufficient factors which distinguish the case before the Court from those previously decided by the United States Supreme Court. As the Suppression Court correctly noted, the search in *Mincey* involved the warrantless examination of a premises over a four-day period and involved a full-scale search and seizure. In *Thompson*, police were called to the house on the basis of an emergency, but then proceeded to look within closed drawers in a dresser to obtain items to be used in an investigation. The Superior Court referred to the Suppression Court Opinion authored by Judge McGinley in which she found that "all items seized by the police were in plain view." Under the test established in *Arizona v. Hicks*, *supra*, the police must lawfully be in a position to view the evidence, the discovery of the evidence must be inadvertent, and the evidence must be suspected contraband. If an article is already in plain view, neither its observation nor its seizure would involve an invasion of privacy. *Hicks*, 480 U.S. at 325, 107 S.Ct. at 1152. In this case, the police were lawfully on the scene and justified in

searching every room at the scene of a homicide to determine the existence of any other victims or persons who might be injured, endanger the police, or destroy evidence. Since the *Hicks* decision, the United States Supreme Court eliminated the inadvertence requirement in *Horton v. California*, 496 U.S. 128, 110 S.Ct. 2301, 110 L.Ed.2d 112 (1990). Upon review, the police officers' actions can be seen to be consistent with an entry into the home based upon exigent circumstances, and the recovery of the murder weapon was the result of a plain view observation by police officers who were lawfully in a position to view the evidence which was suspected contraband.

If, for any reason, this Honorable Court should believe the items seized by the police on March 10, 1991, were not within the plain view exception to the requirement for a search warrant, or that the items were not seized while under exigent circumstances, the respondent/Commonwealth of Pennsylvania would offer that these items would have been inevitably discovered based upon evidence independently obtained by the police. Following the time when the police concluded their search of the house and secured the residence on March 10, 1991, Det. Stauffer and Det. Granitz went to the Lehigh Valley Hospital Center to speak with Reinert. Reinert told the police that he went into the kitchen and obtained a butcher knife which he took upstairs. He also indicated to the police that the knife he used in the stabbing was in the bathroom on the second floor. (S.N.T. 8/20/91, 168; N.T. Vol. II, 111) It was during this conversation, that Reinert related he left the house after stabbing Sean Brady and went to a CVS drugstore in Allentown where he purchased sleeping pills. (S.N.T. 8/20/91, 190; N.T. Vol. II, 115) Based upon the information that was received from Reinert during this conversation, the police returned to the residence on March 12, 1991, with a search warrant to look for evidence referring to Reinert's purchase of sleeping pills and his trip to the drugstore. The police returned on March 20, 1991, with a search warrant to look for the victim's diary in the house.

Even if the police did not observe the knife in the bathroom while conducting the protective search, the defendant's statement gave the police the location of the knife Reinert used to kill the victim. Reinert's statement regarding the location of the knife would have independently provided the police with the basis for being able to obtain a search warrant to return to the home which was still in police custody. See *Segura v. United States*, 468 U.S. 796, 104 S.Ct. 3388, 82 L.Ed.2d 599 (1984) and *Murray v. United States*, 487 U.S. 533, 108 S.Ct. 2529, 101 L.Ed.2d 472 (1988). The police did so on at least two occasions subsequent to March 10, 1991. The United States Supreme Court has stated that the exclusion of physical evidence that would have been inevitably discovered adds nothing to either the integrity or fairness of a criminal trial. *Nix v. Williams, supra*, 417 U.S. at 446, 104 S.Ct. at 2510, 81 L.Ed.2d at 389. The Court went on to state, "But when, as here, the evidence in question would inevitably have been discovered without reference to the police error or misconduct, there is no nexus sufficient to provide a taint and the evidence is admissible." *Nix v. Williams, supra*, 467 U.S. at 449, 104 S.Ct. at 2501.

In evaluating the actions of the police officers on March 10, 1991, this Court has emphasized the application of reasonableness in examining the totality of the circumstances. *Ohio v. Robinette*, ___ U.S. ___, 117 S.Ct. 417, 136 L.Ed.2d 347 (1996). In *Florida v. Royer*, 460 U.S. 491, 103 S.Ct. 1319, 75 L.Ed.2d 229 (1983), the United States Supreme Court expressly disavowed any "litmus paper test" or single "sentence or paragraph rule," in recognition of the "endless variations in the facts and circumstances "implicating the Fourth Amendment." *Id.*, at 506, 103 S.Ct. at 1329. Where independent exigent circumstances justify a Fourth Amendment intrusion by police who are investigating grave crimes, evidence should not be deemed inadmissible even though similar circumstances would not justify warrantless intrusions for less serious offenses. *United States v. Aquino*, 836 F.2d 1268 (10th

Cir. 1988). The exigent circumstances justifying a warrantless search vary from case to case and the determination of the issue is of necessity fact-specific. *Osabutey v. Welch*, 857 F.2d 220 (4th Cir. 1988).

It is well-settled law that visual observations by a law enforcement officer situated in a place where he has a right to be is not a search within the meaning of the Fourth Amendment. *United States v. Coplen*, 541 F.2d 211, 214 (9th Cir. 1976), cert. denied, 429 U.S. 1073, 97 S.Ct. 810, 50 L.Ed.2d 791 (1977) What is visible through an open door is in plain view and not subject to Fourth Amendment protection. *United States v. Lloyd*, 36 F.3d 761 (8th Cir. 1994). Contrary to petitioner's contentions, the police did not aggravate the petitioner's Fourth Amendment rights by moving objects in plain view. In *United States v. Boettger*, 71 F.3d 1410 (8th Cir. 1995), the seizure of bomb-making materials and literature in a defendant's apartment during a search for destructive devices and explosive chemicals following an explosion in that same apartment, was permissible under the plain view doctrine, even though officials had to search through books, papers and other debris littering the apartment to find the questioned items.

In the present case, the Suppression Court found that all three prongs of the plain view exception were met in the present case. This opinion was affirmed by the Pennsylvania Superior Court and the Pennsylvania Supreme Court which referred to the exact language by the judge hearing the suppression motion. Even if the items seized were not observed by officers engaged in an investigation under exigent circumstances, the petitioner's own statement would have provided the police with an independent, untainted source of information from which a search warrant would have been obtained. Under such a fact pattern, suppression of the physical evidence would not serve any legitimate purpose.

B. The Suppression Court ruled correctly in denying the suppression motion where statements made by the defendant on March 10, 1991 occurred after defendant was provided with his *Miranda* rights on two occasions, and his waiver of rights was knowing, intelligent and voluntary.

Any determination regarding the voluntariness of a confession must be viewed under a totality of the circumstances test. *Arizona v. Fulminante*, 499 U.S. 279, 111 S.Ct. 1246, 113 L.Ed.2d 302 (1991). Federal courts have found in the past that intoxication and fatigue do not automatically render a confession involuntary. Instead, the test is whether those mental impairments caused a defendant's will to be overborne. *United States v. Casal*, 915 F.2d 1225 (8th Cir. 1990). A mere assertion that a statement may have been made while the speaker was under the influence of drugs is not sufficient to satisfy the burden of proving involuntariness, for voluntariness is not to be judged solely by reference to the speaker's state of mind, but to the exclusion of other relevant factors. *Wolrath v. LaVallee*, 576 F.2d 965 (2d Cir. 1978). Inculpatory statements made by a defendant at a hospital were not the product of an unconstitutional coercion, even though the defendant was relatively young and foreign-born with a poor command of the English language, was recovering from a serious knife wound and was in significant pain, where he was alert and awake, the investigators did not press the defendant to be interviewed, and the interrogations were relatively short. *Campaneria v. Reid*, 891 F.2d 1014 (2nd Cir. 1989).

An express written or oral statement or waiver by a defendant of his right to remain silent or of the right to legal assistance of counsel, though not conclusive, is "usually strong proof of validity of that waiver." *North Carolina v. Butler*, 441 U.S. 369, 373, 99 S.Ct. 1755, 1757, 60 L.Ed.2d 286, 292 (1979). In *United States v. Hack*, 782 F.2d 862 (10th Cir. 1986), the pain experienced by the defendant from a gunshot wound to his

mouth inflicted during an attempted escape from federal authorities did not render his statements to the police involuntary, where a treating physician did not consider the wound serious and merely prescribed Novocain for it, and the defendant, who was mentally alert, had signed an express waiver of his *Miranda* rights. Compared to the facts of *Hack*, Reinert was in far superior command of his mental faculties at the time he provided statements to the police and medical personnel. Reinert was found to be alert, awake and oriented by the paramedic and the emergency room nurses who treated him. He received only mild anesthesia during surgery, and his surgeon found Reinert to be in a sufficiently stable condition to speak with the detectives six hours after his operation.

The petitioner claims the statements made by Reinert in the ambulance to the EMS technician Timothy Snyder were made while Reinert was in custody and were the result of questioning by police officers or a paramedic working at the behest of the police officers. These allegations ignore the fact the only restraints placed upon Reinert's liberty were those created by his own self-inflicted medical condition rather than any coercive action on the part of the police. There is no indication from the record that either paramedic Snyder or the two emergency room nurses asked any question of Reinert upon orders or request from the police officers. Instead, the record shows that Snyder specifically testified that he was not asked or requested by Officer Zimmerman or any other police officer to ask the patient any questions. (S.N.T. 8/20/91, 18) Reinert was asked questions by Sndyer that are typically posed to a patient in an emergency condition in order for the paramedics to determine what happened to cause the patient's injuries. (S.N.T. 8/20/91, 13) The emergency room nurse, Thomas Gavigan, testified he was not instructed by Officer Zimmerman to ask any questions, but did make inquiries of Reinert for purely medical purposes. (S.N.T. 8/20/91, 78) As a result, Reinert was not in custody when he was questioned by the paramedic or the emergency

room nurses, and therefore, was not entitled to any *Miranda* warning before speaking with those individuals.

The petitioner makes the untenable argument that when private citizens volunteer or are requested to assist the police, they become the agents of the government, and any of their actions must therefore be constricted by the *Miranda* warnings. This claim is completely without support in the record or under any decision by this Court. The Suppression Court judge concluded the statement made to Paramedic Snyder was not made while the defendant was in custody and statements made to Officer Zimmerman were only uttered after the defendant waived his *Miranda* rights. At the time of Reinert's first statement to Officer Zimmerman, the police did not even know if Reinert and Brady had been attacked by a third person. Judge McGinley also found the statements made to the emergency room nurses by Reinert occurred when the police were not present, nor were any questions asked by hospital personnel upon the request of police.

On two occasions, Reinert was *Mirandized* before police officers questioned him. Officer Zimmerman did not know the nature of a statement Reinert made to paramedic Snyder which prompted Snyder to suggest Zimmerman speak with the defendant. Reinert was within complete control of his mental faculties based upon an evaluation by Snyder and the emergency room nurses. The final statement Reinert provided to Detectives Stauffer and Granitz was also preceded by the administration of the *Miranda* warnings. Contrary to the exaggerated description provided by petitioner, the Suppression Court found, "The duration of the interrogation was relatively short, and the defendant volunteered incriminating statements early in the interrogation. The method of interrogation involved no coercion, threats or other similar techniques that would pressure the defendant and compromise his willingness to make a statement." (Suppression Ct. Opinion, Appendix, B-12)

The testimony from the Suppression Hearing indicated the defendant was in stable condition and that he had not been given sedatives or pain killers from the time of surgery until after the detectives left. (S.N.T. 8/21/91, 7-11) The defendant was able to provide accurate biographical information to the police officers, and gave cogent and logical answers in response to questions posed by the police. These included questions regarding the physical description of Det. Granitz, where Mr. Reinert was at the time, and his telephone number. (S.N.T. 8/20/91, 136-142) The defendant's waiver of his *Miranda* rights can be found in his explicit understanding of those rights, and his proffered explanation of how the victim was killed. (N.T. Vol. IV, 111-116) Judge McGinley took special note of the fact Det. Stauffer conferred with the defendant's doctor and inquired about his condition prior to the interview. The doctor, who had just done a post-operative check on the defendant, thought the defendant was capable of answering Det. Stauffer's questions. (Suppression Ct. Opinion, Appendix, B-12)

In an attempt to provide support for the belated attack upon the Suppression Court's reasoning, petitioner has included a number of affidavits as appendices to this Petition for Writ of Certiorari. These affidavits were never entered as matters of record in the lower court and the affiants have never been subjected to cross-examination based upon their opinions. The respondent/Commonwealth believes that this Court cannot consider allegations which are not a matter of record and which are presented to the Court merely as attachments to a pleading. *United States v. Madkins*, 994 F.2d 540 (8th Cir. 1993). In fact, the petitioner has included affidavits which were not originally filed with the appeal to the Pennsylvania Superior Court, but which were only submitted after the Superior Court denied the petitioner's post-trial motions to that Court. These affidavits were written by persons who did not have the opportunity to witness the defendant during the time period in which he was in the hospital or in the ambulance, who relied solely upon hypothetical evaluations from medical records, and who still

have not ever stated that they were available and willing to testify in these matters at the time of trial.

The petitioner claims the existence of testimony from the defendant's friends and family undermines the validity of the Suppression Court Opinion. The Suppression Court was provided the benefit of listening to testimony from all individuals about Reinert's condition at the time when the statement was made to the detectives, and the jury was able to consider relevant testimony from the same witnesses in evaluating the integrity of the statement the detectives received from Reinert. Although the detectives did not record the statement provided by Reinert, the failure to tape record or video tape a criminal defendant's confession does not, in itself, undermine the validity of the defendant's waiver of his *Miranda* rights, though such equipment was available to police officers. *United States v. Yunis*, F.2d 953 (D.C. Cir. 1988). Nothing about the hospital setting automatically renders the statement inadmissible. An inculpatory statement made by a defendant may be found to be voluntary notwithstanding that it was made in a hospital setting, provided the statement was not the result of any overbearing influence by the police. *Commonwealth v. McQuaid*, 273 Pa. Super. 600, 417 A.2d 1210 (1980), *United States v. Martin*, 781 F.2d 671 (9th Cir. 1985) and *United States v. Faul*, 748 F.2d 1204 (8th Cir. 1984).

The denial of the suppression motion was affirmed by the panel reviewing post-trial motions, by the Pennsylvania Superior Court, and by the Pennsylvania Supreme Court. There is not any basis in the record or under relevant case law to find the petitioner's statements were not provided intelligently, voluntarily and knowingly.

C. The defendant was not denied his Fifth and Sixth Amendment rights to effective assistance of trial counsel, due process and a fair trial.

When the issue of ineffective assistance of counsel was first raised in the Superior Court, petitioner failed to base his claim of ineffective assistance upon a violation of the Sixth Amendment of the United States Constitution. As a result, this claim for federal constitutional review is waived. See Respondent's Appendix A.

A defendant claiming ineffective assistance of counsel based on his attorney's performance must establish both that his attorney's performance was objectively unreasonable and that, but for the deficient performance, the result of the trial would probably have been different. *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). " The object of an ineffectiveness claim is not to grade counsel's performance. If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, which we expect will often be so, that course should be followed." *Strickland*, 466 U.S. at 697, 104 S.Ct. at 2069.

Petitioner initially claims that trial counsel was ineffective for failure to call an expert medical or psychiatric witness regarding the petitioner's physical and mental condition. The Pennsylvania Superior Court panel noted in its Opinion that trial counsel need not introduce expert testimony on his client's behalf if he is able to effectively cross-examine prosecution witnesses and elicit helpful testimony. *Commonwealth v. Williams*, 537 Pa. 1, 640 A.2d 1251 (1994). The Superior Court found that after reviewing the record, trial counsel thoroughly cross-examined all the Commonwealth's witnesses regarding Reinert's mental and physical state at the time he was given *Miranda* warnings and when he made statements to both police and medical staff. The Superior Court noted the Commonwealth produced overwhelming evidence that Reinert knowingly and

voluntarily waived his *Miranda* rights and held, "We conclude that trial counsel was not ineffective for failing to call medical experts at the Suppression Hearing." (Superior Court Opinion, Petitioner's Appendix, A-7)

In addition, where a defendant claims counsel was ineffective for failing to call an expert witness, the defendant must show that evidence was available and identify the witness who was willing to offer such testimony. *Commonwealth v. Holloway*, 524 Pa. 342, 572 A.2d 687 (1990); *United States v. Dean*, 55 F.3d 640 (D.C. Cir. 1995) Despite the introduction of a number of different affidavits from two doctors, the existence of certain opinions six years after the fact does not mean those doctors would have been willing and able to testify at either the Suppression Hearing or at the trial. Importantly, the affidavit from Dr. Sadoff misperceives the standard in question from whether the defendant knowingly, intelligently and voluntarily waived his rights to be whether the defendant "could effectively resist the interrogation of skilled police officers." (Dr. Robert Sadoff, Appendix, G-5) The opinions rendered by Dr. Sadoff and Dr. Bornfriend are based upon a cold review of records without benefit of being able to evaluate Reinert at the time that he provided the statements. Rather than relying upon post hoc evaluations of records, the Suppression Court and other appellate courts have found the testimony from the medical professionals who treated Reinert to be much more persuasive.

Petitioner also claims trial counsel was ineffective for not informing Reinert of his right to testify at the Suppression Hearing. In this particular case, Reinert's counsel called his mother, step-father, girlfriend and minister to testify to his physical condition during the Suppression Hearing. As a result, the Suppression Court had the benefit of hearing all possible evidence regarding the defendant's mental and physical state surrounding the time he gave statements to the police. Additionally, it would have been highly irregular to subject the defendant to cross-examination under oath at the Suppression

Hearing. Reinert took the stand during the trial and offered a lengthy explanation of his recollection of the entire incident leading up to and following the death of Sean Brady. By taking the stand at the Suppression Hearing, the defendant would have been potentially providing the Commonwealth with means to impeach his testimony at trial. Such a course of action would have been deemed to be highly suspect and subject to an allegation of ineffectiveness. Latter-day concessions of ineffectiveness by trial counsel or allegations of the same by the defendant do not mitigate the propriety of the actions taken during the time of trial. Such affidavits should be seen as nothing less than an after thought in an attempt to overturn the jury's verdict.

Petitioner's third allegation of ineffectiveness claims that trial counsel was ineffective for failing to testify at the Suppression Hearing or trial regarding trial counsel's observations of Reinert after he spoke to Detectives Stauffer and Granitz. As noted above, the Suppression Court had the benefit of listening to Reinert's mother, step-father, his girlfriend and his minister regarding their observations of Reinert at the time he provided a statement to the police. The defendant testified during his trial to strengthen the evidence from his own witnesses. The additional testimony from counsel would have been merely cumulative, and therefore cannot be seen as ineffective assistance.

The petitioner's last allegation of ineffectiveness focuses upon trial counsel's failure to obtain expert testimony regarding the effect of the drug Prozac upon the victim, Sean Brady. The Pennsylvania Supreme Court has written, "When a defendant claims that some sort of expert testimony should have been introduced at trial, the defendant must articulate what evidence was available and who was willing to offer such evidence." *Williams, supra,* 537 Pa. at 29, 640 A.2d at 1265. To this time, petitioner Reinert has failed to identify any witness who was qualified and willing to offer evidence concerning the

effects of Prozac at the time of trial. Although the affidavits supplied by the petitioner's doctors claim a plethora of experts were easily attainable to testify about the issues surrounding the use of Prozac, neither witness would state unequivocally that he or she was willing and available to testify in 1991 with a reasonable degree of medical certainty about the effects of Prozac. The inability to meet this threshold level would have precluded the testimony. *Commonwealth v. Edmiston*, 535 Pa. 210, 634 A.2d 1078 (1993).

The introduction of testimony regarding the use of Prozac was highly irrelevant because of its lack of connection to the self-defense argument offered by petitioner Reinert. It was never alleged that Reinert himself was using Prozac or that Prozac affected his mental state at the time of the murder. Instead, the Prozac was being used exclusively by the victim. All relevant testimony concerning the defendant's regard for the victim and his concern about the victim's alleged suicidal tendencies was admitted during the trial. (N.T. Vol. VII, 59) Testimony was also presented by the defendant from his mother, girlfriend, and two other friends surrounding the defendant's relationship with the victim and his long-running devotion to the victim's welfare. Any testimony about Prozac would have been injected solely for the purpose of smearing the victim in the minds of the jurors. Without any witness who can state that they would have presented testimony within a reasonable degree of medical certainty, trial counsel cannot be found to be ineffective for failure to call such a witness that did not exist.

D. The trial court ruled correctly in denying the introduction of lay testimony concerning the victim's use of Prozac.

This claim was also never based upon a federal constitutional violation, and should be deemed waived. See Respondent's Appendix B) The defendant was afforded all possible opportunities to argue self-defense and any lesser

degree of homicide to the jury. The prohibition upon the introduction of lay testimony regarding the victim's use of Prozac did not infringe upon the defendant's ability to present those defenses. Without established scientific testimony presented from credible witnesses regarding the use of Prozac, there was no basis for the introduction of the issue during the trial. This is only compounded by the fact that the defendant never claimed that he used Prozac or that it affected his mental faculties on the night of the homicide. Reinert attempted to claim he stabbed Brady six times in the chest in an attempt to prevent Brady from committing suicide. While lay testimony surrounding a defendant's actions, conversations and statements preceding a criminal event may be relevant for a jury, this is quite distinguishable from lay testimony regarding a dead victim's ingestion of a drug for which there was no authoritative scientific opinion.

Because of the absence of any foundation for the introduction of testimony regarding the use of Prozac, the Trial Court ruled correctly in excluding any reference to this drug. The defendant did not submit an offer of proof or any proposed testimony that the victim's use of Prozac created a reasonable or unreasonable belief in the need for self-defense on the night Reinert stabbed Brady. Even within the Petition for Writ of Certiorari, the petitioner has failed to explain how testimony surrounding the use of Prozac by the victim would have been used to rebut motive or to support an allegation of the belief in the need for self-defense, however reasonable or unreasonable. To have permitted the jury to consider testimony regarding the use of a controversial drug, even if unnamed, would have subjected the jury to a collateral issue in this case without the basis of any factual observations or expert testimony. Therefore, the Trial Court ruled correctly in prohibiting the introduction of any lay testimony regarding the victim's use of Prozac.

CONCLUSION

For all the foregoing reasons, this Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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Counsel of Record

Attorney for Respondent

Supreme Court, U.S.
FILED
JUN 12 1997
OFFICE OF THE CLERK

(4)

No. 96-1809

In The
Supreme Court of the United States

October Term, 1996

SCOT A. REINERT,

Petitioner

v.

COMMONWEALTH OF PENNSYLVANIA

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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C. THE APPELLANT'S TRIAL COUNSEL WAS INEFFECTIVE IN FAILING TO CALL, DURING THE SUPPRESSION HEARING: (1) OFFICER MERTZ, THE FIRST POLICE OFFICER ON THE SCENE, TO GAIN A COMPLETE PICTURE OF POLICE ACTIVITIES ON SUNDAY, MARCH 10, 1991; (2) REINERT HIMSELF; (3) ONE OF APPELLANT'S TRIAL COUNSEL; AND (4) A MEDICAL EXPERT TO TESTIFY TO THE APPELLANT'S PHYSICAL AND MENTAL CONDITION; AND FURTHERMORE WAS INEFFECTIVE IN FAILING TO CALL AT TRIAL, (3) AND (4) ABOVE.

The Suppression Hearings of August 20 and 21, 1991 focused on the admissibility of Appellant's alleged statements to the police and of the items seized by the police's warrantless search on Sunday, March 10, 1991. Clearly, the mental and physical condition of Appellant, given his suicide attempts, wounds and subsequent medical attention, was of great import in aiding the court in deciding whether the Appellant could knowingly and voluntarily waive his **Miranda** rights. Of equal import to the court's decision, vis-a-vis the seized items, was whether, as the Commonwealth claims, the secondary search made by Detectives Stauffer and Granitz and Sgt. Moyer was indeed necessary to secure the crime scene and protect the police and the evidence. Remarkably, however, trial counsel failed to call, or insure the appearance of, either Officer Mertz, the first officer on the scene, an expert medical witness, Reinert himself, or one of appellant's trial counsel, who saw Reinert on the evening of Sunday, March 10, 1991, and could have testified, just as the Commonwealth witnesses did, as to his mental and physical condition.

I. FAILURE TO CALL OFFICER MERTZ OR RENEW MOTION TO SUPPRESS

To establish ineffective assistance of counsel, a defendant must demonstrate that: 1) The underlying claim is of arguable merit; 2) the counsel's performance was unreasonable; and, 3) the counsel's ineffectiveness prejudiced the defendant. **Commonwealth v. Williams**, ___ Pa. ___, 640 A.2d 1251 (1994), citing **Commonwealth v. Clemmons**, 505 Pa. 356, 479 A.2d 955 (1984). With regard to the meritorious nature of Appellant's claim that the Allentown police conducted an illegal and unconstitutional search and seizure, he respectfully refers this Honorable court to Section A of this argument. Supra, 1. Officer Mertz was the first person to respond to the scene, Appellant's home, on Sunday, March 10, 1991. His testimony at trial included a very specific description of his entrance to the Reinert home and his subsequent search for "figures" on all floors as he headed to the third floor to check reports of a body. His testimony also included his subsequent order to Officer Stauffer to secure the residence and report to the dispatcher. It is submitted that this testimony, in conjunction with Officers Zimmerman, Lembach and Brader's testimony of their securing both entrances to the home, performing a protective walk-through of the first floor, and maintaining control of the Mr. Reinert and his parents in the front living room, completes the picture of a secure crime scene, which obviated the purported need for Detectives Stauffer's and Granitz's later secondary warrantless search and seizure. Trial counsel failed to secure Officer Mertz's presence on the stand, his testimony was never heard by the judge at the suppression hearing, and was never included in the suppression court's deliberations. Alternatively, trial counsel should have renewed the Motion to Suppress at trial, upon the receipt of additional, supporting information, including the testimony of Officer Mertz.

Thus, the trial court's conclusion that the search conducted by Officer Stauffer was legal, due to the necessity

to secure the crime scene, and its reliance on this "legal presence" to support its conclusion that the seizure of items without a warrant fell under the plain view exception to warrantless searches, was erroneous, but in any event, was based on incomplete information. Supra p.4. The lower court's order denying defendant, Reinert's, request for suppression allowed the Commonwealth to offer into evidence, among other items seized at the time, the, it is submitted, illegally seized butcher knife, photographs and videotape itself, as well as notes which the Commonwealth used to support their "jilted lover" motive for the alleged homicide. Given the ease of obtaining Officer Mertz's presence, and the existence of a process by which a defendant can effect a compulsory confrontation of witnesses, the trial counsel's failure to elicit and secure Officer Mertz's presence and testimony at the suppression hearing was unreasonable. Further, there is no apparent strategic or tactical reason for not eliciting Officer Mertz's testimony, especially in light of the fact that prior counsel called all the other officers to the stand at the hearing, and there was no possible negative impact from the officer's testimony. Further, trial counsel was ineffective in not renewing, at trial, the motion to suppress, once Officer Mertz's testimony was revealed.

2. FAILURE TO INFORM REINERT OF HIS RIGHT TO TESTIFY

Reinert further submits that his trial counsel was ineffective in not informing him of his right to testify at the Supression Hearing, not discussing with him the possibility of his so testifying, and not calling him to discuss his physical and mental state on Sunday, March 10, 1991. See, Appendix "D," Affidavit of Scot A. Reinert, all of which would have made clear the strength of his suppression motion. Further, as Reinert's statements were the critical lynchpin in the Commonwealth's case, it was clearly ineffective and unreasonable to fail to call Reinert to the stand.

3. FAILURE TO CALL AN EXPERT MEDICAL AND PSYCHIATRIC WITNESS FOR THE SUPPRESSION HEARING AND/OR FOR TRIAL

Appellant further submits that trial counsel's failure to obtain an expert witness to testify, both at the suppression hearing, and at trial if any statements survived the suppression hearing, about Mr. Reinert's medical and mental condition at the time he made the statements, and his ability to knowingly and intelligently waive his constitutional rights, and voluntariness, was ineffective assistance of counsel. When a claim of ineffective assistance of counsel focuses on counsel's failure to retain expert witnesses, "the defendant must articulate what evidence was available and identify the witness who was willing to offer the evidence. " **Williams**, 640 A.2d at 1265, citing **Commonwealth v. Halloway**, 524 Pa. 342, 572 A.2d 687 (1990).

Among the pivotal issues presented and decided at the suppression hearing were Appellant's ability to waive his **Miranda** rights both in the ambulance and in the hospital given his mental and physical. [sic] The Commonwealth presented the observations of police officers, paramedics, and Appellant's surgical doctor to support its contention that Appellant's condition did not inhibit his judgment vis-a-vis his waiver of **Miranda** rights. In response, trial counsel called Mr. Reinert's parents, neither of whom have any medical training. However, again inexplicably, trial counsel failed to call an expert witness to the stand to testify, after review of Appellant's medical records, about Appellant's physical injuries and subsequent severe blood loss, and his mental state, including his attempts at suicide, on his cognitive ability and decision-making process. The ineffectiveness in this case is especially egregious as Reinert's prior counsel had informed him early on that such a witness would be obtained, and they had several discussions about the matter prior to the Suppression Hearing, and again prior to trial. See, Appendix "D,' Affidavit of Scot Reinert. It is

submitted that medical testimony, in conjunction with Appellant's injuries, the circumstances surrounding the police interrogation, and prevailing case law, See, supra 13, would have presented a meritorious case for the suppression of Reinert's statements.

Attached hereto are the reports and curriculum vitae of two expert witnesses. The first is Dr. Robert L. Sadoff, perhaps the leading psychiatrist in this geographic area, and the second is Dr. Lynn Allison Bornfriend. Doctor Sadoff's report is quite clear that, based on the totality of the circumstances at the time, including his physical and mental condition, Reinert was incapable of waiving his rights at the time he made the statement to Detectives Stauffer and Granitz in the hospital on the evening of Sunday, March 10, 1991. Affidavit of Dr. Robert L. Sadoff. Dr. Bornfriend's report is also quite clear that at the time Reinert made his statement to Officer Zimmerman in the ambulance, and at the time he made another statement to the detectives in the hospital, he was incapable of knowingly and intelligently waiving his **Miranda** rights. Appendix "B," Affidavit of Dr. Lynn A. Bornfriend.

Appellant contends that, given the ready availability of such witnesses and the favorable conclusions reached in their reports, it was plainly unreasonable for trial counsel to fail to secure and call such a witness. Similarly, given the fact that prior counsel was pursuing suppression based on Reinert's inability to make a knowing and intelligent waiver, there appears to be no reasonable tactical or strategic basis for not presenting such a witness to the court for consideration. Without this testimony, the trial court again made its determination as to the admissibility of the statements on incomplete evidence, and the incriminating statements, which were significantly relied on by the Commonwealth, were presented to the jury. Further, any delays in obtaining an appropriate examination of his physical and mental condition can only be recognized as extremely prejudicial.

Commonwealth v. Turiano, 601 A.2d 846 (1992))(Court found meritorious Appellant's argument that counsel was ineffective for failing to arrange a mental health examination in a timely fashion, and this ineffectiveness prevented Appellant from receiving an exam, crucial to his defense of insanity, at a point in time when the exam would be relevant to the defense). Therefore, Appellant respectfully requests this court to find trial counsel ineffective in her representation, suppress, reverse the conviction, and remand for a new trial.

4. TRIAL COUNSEL, ONE OR BOTH, SHOULD HAVE TESTIFIED IN THE SUPPRESSION HEARING AND AT TRIAL AND/OR WITHDRAWN IF NECESSARY.

Finally, Reinert contends that trial counsel was ineffective for failing to testify at Appellant's suppression hearing/trial, especially as trial counsel, two from the same firm, visited Reinert at the hospital the night of March 10, 1991, N.T., Vol. V, 160, and were in a position to testify as to his mental and physical condition. See, Appendix "E" and Appendix "F," Affidavits of Charles and Janet Ketner. One of Reinert's two counsel should have testified at the suppression hearing about Reinert's ability to waive his **Miranda** rights, and let the other remain counsel for the duration of that hearing. See, Rules of Professional Conduct, Rule 3.7[1], especially since the fact-finder at the suppression hearing was a judge, and the jury would be unaware that trial counsel ever acted as a witness. Or, barring that, counsel should have withdrawn as counsel to act as a witness in the proceedings. After the results of the suppression hearing were known, counsel could then determine whether they needed to testify at trial, and if necessary, they should have done so under the aegis of Rule 3.7, or have withdrawn to do so.

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[1] "(b) A lawyer may act as advocate in a trial in which another lawyer in the lawyer's firm is likely to be called as a witness, unless precluded from doing so by Rule 1.7 or Rule 1.9 [Conflict of Interest Provisions]."

It is submitted that, on this record, this Honorable court can determine that trial counsel was ineffective. However, if this Honorable Court determines that it cannot determine whether trial counsel was reasonable in failing to call any of the above witnesses, Appellant respectfully requests this Honorable Court to vacate the judgment of sentence and remand for an evidentiary hearing on this issue. **Commonwealth v. Miller**, 430 Pa. Super. 297, 308, 634 A.2d 614, 619 (1993); **Commonwealth v. Free**, 301 Pa. Super. 425, 430, 447 A.2d 1041 (1982); **Commonwealth v. Fierst**, 423 Pa. Super. 232, 248, 620 A.2d 1196, 1205 (1993). The affidavits are included in order to comply and demonstrate the merits of Appellant's position.

IN THE COURT OF COMMON PLEAS OF LEHIGH COUNTY, PENNSYLVANIA

CRIMINAL DIVISION

COMMONWEALTH OF PENNSYLVANIA

V.

SCOT A. REINERT

NO. 1128 OF 1991

DEFENDANT'S POST-VERDICT MOTIONS IN ARREST OF JUDGMENT AND FOR A NEW TRIAL

TO THE HONORABLE, THE JUDGES OF THE SAID COURT:

COMES NOW the Defendant, Scot A. Reinert, and states the following:

1. The court erred in denying the Defendant's Motion to Suppress all statements made by him for the reason that the Commonwealth failed to establish that the statements were made voluntarily and intelligently and that the contents of the statements were reliable.

2. The court erred in refusing to suppress all evidence seized from the home at 120 N. West Street, Allentown, PA, for the reason that said evidence was obtained without a proper search warrant, without exigent circumstances or any other legal justification for the seizure on March 10, 1991.

3. The Court erred in precluding a major component of the defense when it required that there could be no testimony mentioning the prescription drug Prozac (which Sean Brady was

taking for several months prior to his death,) either by name or by reference to "medication" unless an expert was called to testify to the effects of that drug. In accordance with a written offer of proof filed with the court and the various oral offers of proof, it was not the intent of the defense to prove what the actual effects of this very controversial drug are, but to offer the Defendant's observations of Brady's conduct after he began using the medication and of the arguments they had on the subject.

4. The Court erred in permitting the Assistant District Attorney to question prospective jurors in an attempt to "life-qualify" them, but without advising them that the sentence for first degree murder carries a mandatory sentence of life without parole as requested by the defense.

5. The Court erred in permitting the Commonwealth to play a videotape taken at 120 N. West Street, Allentown, PA, on March 10, 1991, for the reasons that said video was inflammatory, particularly in light of the fact that it dwelled at great length on the body of Sean Brady, taken from various angles. Said video did not have any probative value and was not useful for the jury's understanding of the case. Said video did not depict the scene at the time the police arrived at the home, but was recorded after various changes had been made at the scene, including the repositioning of the body. Said video was cumulative in light of all of the other photographs which were introduced at the scene and of the wounds.

6. The Court erred in granting the Commonwealth's Motion to Strike for Cause prospective jurors fifteen, Roger Hahn, and thirty-two, Michael Dalessandro, as those jurors indicated that they could follow the instructions as set forth by the Court.

7. The Court erred in denying Defendant's Motion to Strike for Cause prospective juror number forty-two, John

Heiney, in that said juror did not indicate that he could set aside the preconceived ideas he had and indicated that he would have difficulty following the instructions of the court.

8. The Court erred in allowing the Commonwealth to introduce Commonwealth exhibits 42, 43, 44 and 45, all being photographs of the body of Sean Brady, said photographs being inflammatory and their potential prejudice to the defense outweighing any probative value they had. Moreover, these photographs were cumulative and even if one or two were to have been properly introduced, introducing all four was cumulative and prejudicial to the defense.

9. The Court erred in allowing the Commonwealth to introduce exhibit number 57, the blood soaked T-shirt worn by Sean Brady, said T-shirt, which was repeatedly shown to the jury, being extremely inflammatory and being probative of absolutely nothing. Moreover, any probative value was far outweighed by the inflammatory and prejudicial nature of this exhibit.

10. The Court erred in allowing Thomas Gavigan, a Registered Nurse, to testify as an expert and to render his opinion that the all of the wounds sustained by Scot Reinert were self-inflicted, said witness not being properly qualified to render any such opinion and said opinion being a question of ultimate fact to be determined by the jury.

11. The Court erred in denying the defense request for a mistrial following Dr. Mihalakis' reference to the fact that the Defendant was incarcerated in Lehigh County Prison at the time he was examined by Dr. Mihalakis following this incident.

12. The Court erred in requiring defense counsel to turn over to the prosecution various notes prepared by the defense, which notes were work product and which notes were not substantially verbatim statements taken of any of the witnesses

who testified and were not adopted by the witnesses as their statements.

13. The Court erred in refusing the defense request to play the tape recorded by the Allentown Communications Center when Charles Ketner called to report the incident.

14. The Court erred in permitting the Commonwealth to call on rebuttal Detective Stauffer, who testified to nothing new; all of the matters covered on rebuttal having been previously covered in the direct testimony and/or not being relevant to anything other than collateral matters.

15. The Court erred in allowing the Commonwealth to call on rebuttal Anne Marie Orr and then erred in prohibiting the defense from properly cross-examining said witness on her testimony, said witness offering the hearsay statements of Sean Brady and said testimony not being proper rebuttal of any subject relevant to the jury's determination.

16. The Court erred in allowing the Commonwealth to call on rebuttal Susan Nienkawicz, said testimony not being proper rebuttal, not rebutting anything of relevance in the matter and/or being rebuttal only on a collateral issue raised by the Commonwealth.

17. The Assistant District Attorney committed misconduct when he referred to his closing argument to the fact that the victim could not come in and testify and that he could not rebut the allegations made by the defense and the Court erred in overruling the defense objection to this line of argument.

18. The Court erred in denying Defendant's Points for Charge 1, 2, 3, 4, 12, 17, 20, 21, 22, and 23.

19. The Court erred in instructing the jury that the

Defendant, who was present in his own home, had the duty to retreat in conjunction with the defense of self-defense.

20. The Court erred in sending Commonwealth exhibits 42, 43, 44, 45, 46, 48, 52, 53, 54, 67, 68, 102, 103, 107 and 115 out with the jury during their deliberations.

21. The Court erred in not sending out with the jury Defense exhibits 8 and 24, and Commonwealth exhibit 112.

22. The Court erred when, in response to a request from the jury, it sent in a redacted version of the note contained in the green notebook and in sending in only one of two notes offered by the defense which the jury had requested to see.

23. The Court erred in replaying the video taken at the scene at the request of the jury.

Respectfully submitted,

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